No. 02-8286

Court, U.S.
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IN THE

Supreme Court of the United States

DELMA BANKS, JR.,
Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	State habeas proceedings-*Ex parte Banks*, Application No. 13568-03
01/13/92	Banks files third state habeas petition raising 17 grounds for relief
04/01/92	Banks files first supplement to writ adding 3 claims
04/02/92	Banks moves for discovery
09/30/92	Banks files second supplement to writ
10/01/92	Banks moves to compel discovery
10/01/92	Banks moves for investigative funds
02/22/93	State habeas court issues findings of fact and conclusions of law
02/25/93	Court of Criminal Appeals orders habeas court to conduct a hearing and to issue additional findings and conclusions
03/29 to 04/01/93	Evidentiary hearing conducted
07/22/93	State habeas court issues additional findings and conclusions
01/10/96	Court of Criminal Appeals denies habeas relief
	Federal habeas proceedings—*Banks v. Cockrell*, U.S.D.C. No. 5:96-CV-353
03/07/96	Banks files his original complaint/habeas petition (DE 1)
09/23/96	Director answers and moves for summary judgment (DE 13)

DATE	PROCEEDINGS
06/12/98	Banks moves for leave to conduct discovery (DE 55)
06/16/98	Banks moves for an evidentiary hearing (DE 56)
07/07/98	Director opposes Banks' requests for discovery and for hearing (DE 61)
10/28/98	Order—granting in part motion for discovery (DE 65)
01/21/99	Notice of evidentiary hearing set for 6/07 & 6/08 (DE 69)
01/21/99	Order—for parties to list issues for hearing (DE 70)
02/24/99	Director responds to order (DE 72)
02/26/99	Banks responds to order (DE 73)
03/04/99	Order—scheduling order (DE 74)
03/04/99	Order—no further discovery beyond that set in scheduling order (DE 75)
03/05/99	Order establishing issues for evidentiary hearing (DE 80)
05/11/99	Banks moves for admission of Robert Farr's declaration or for leave to depose Farr (DE 88)
05/12/99	Banks moves to compel discovery (DE 89)
05/19/99	Director responds to motion for admission of Farr declaration (DE 94)
05/21/99	Order—denying motion for admission and leave to depose but allowing Banks to present declaration at hearing, yet not ordering it will be admitted (DE 95)

DATE	PROCEEDINGS
05/21/99	Director files supplemental opposition to motion for admission (DE 97)
05/21/99	Director opposes motion to compel discovery (DE 98)
05/24/99	Affidavit from ADA James Elliott re: motion to compel (DE 100)
05/26/99	Order—denying motion to compel (DE 101)
06/07 - 06/08/99	Evidentiary hearing conducted
07/02/99	federal evidentiary hearing transcript filed (DE 116)
11/22/99	Banks files post hearing brief (DE 123)
11/29/99	Director files post hearing brief filed (DE 124)
02/11/00	Director's proposed findings and conclusions filed (DE 134)
03/07/00	Banks' proposed findings and conclusions filed (DE 139)
05/11/00	Magistrate—issues findings and conclusions, recommending relief (DE 141)
05/25/00	Director's objections filed (DE 143)
05/31/00	Banks' objections filed (DE 147)
08/18/00	Memorandum opinion and order—adopting R&R, except noted (DE 149)
08/18/00	Final Judgment (DE 150)
09/01/00	Banks moves to alter or amend judgment (DE 151)
10/05/00	Director responds to motion (DE 157)

DATE	PROCEEDINGS
11/16/00	Banks replies to the Director's response (DE 158)
12/20/00	Order—denying Banks' motion to alter or amend the judgment (DE 159)
02/01/01	Banks applies for a certificate of appealability ("COA") (DE 165)
02/20/01	Order-denying COA (DE 167)
	Appeal of federal habeas proceedings—*Banks v. Cockrell*, No. 01-40058 (5th Cir.)
08/20/02	Opinion reversing and rendering, and denying COA
09/23/02	Order denying rehearing

IN THE DISTRICT COURT
OF BOWIE COUNTY, TEXAS

No. ___

THE STATE OF TEXAS,

v.

DELMAR BANKS.

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FOR THE DEFENDANT

STATEMENT OF FACTS

BE IT REMEMBERED THAT on the 21st day of May, 1980, the above styled and numbered cause came on for hearing on Examining Trial before the Honorable Ben Grigson, Judge of the Justice of the Peace Court of Bowie County, Texas, and the following proceedings were had.

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[3] THE COURT: Court will come to order and before we start this trial it is my duty to inform your client, Mr. Cooksey, will you have him stand up?

MR. COOKSEY: Stand up, please.

THE COURT: You have a right to testify in this case, but if you do testify anything you say can and will be used against you in the Court of law. Do you wish to testify?

MR. COOKSEY: Your Honor, we will waive our right to testify at this time.

THE COURT: Okay. This Court has been petitioned for an Examining Trial for Delmar Banks charged with capital murder, and it's the State of Texas v. Delmar Banks. What sayeth the State?

MR. ATTAWAY: The State's ready to proceed, Your Honor.

THE COURT: What sayeth the Defendant?

MR. COOKSEY: The Defendant is ready, Your Honor.

THE COURT: Okay, call your witnesses and let them be sworn in, please.

MR. ATTAWAY: Okay, we just have one witness, Willie Huff.

(The witness sworn by the Court)

THE COURT: Okay, you don't have but one witness so you won't need to invoke the rule.

[4] WILLIE HUFF, called as a witness on behalf of the State of Texas, having been first duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. ATTAWAY:

Q. State your name for the record, please.

A. It's Willie Huff.

Q. And how are you employed?

A. Deputy Sheriff of Bowie County, Texas.

Q. And how long have you been so employed?

A. About eight years.

Q. What is your official job title at the Sheriff's Office?

A. Investigator.

Q. As part of your duties is it your responsibility with the Sheriff's Office to conduct the follow-up investigation on felony offenses that are committed within Bowie County and without the territorial limits of cities within Bowie County?

A. Right.

Q. I'll ask you whether or not part of your duties and as part of your job you had an occasion to become involved in the investigation of the murder of a person by [5] the name of Richard Whitehead?

A. Yes, sir, I did.

Q. If you would tell us please when you first became involved and how you became involved.

A. It was on the 14th of April, 1980, we received a call about—about 10:00 or 9:50, I believe, is when Cecil called our Sheriff's Office and said that there had been a body discovered in the Pocket Park out east of Nash, between Nash and Texarkana and Wake Village. I was dispatched to the scene.

Q. Okay, and what did you find upon arriving at the scene?

A. We found a body of a white male lying on the ground up by the pavillion in the park.

Q. And was that the body of a deceased human being?

A. Yes, sir.

Q. Did you find anything else other than a body?

A. We secured the scene; did a crime scene search; found two 25 caliber empty hulls; about seven Coors beer cans; and one missile, one projectile or one lead bullet that was already fired was matted in the blood clot right behind the victim's head on the ground.

Q. Okay. State what the appearance of the body of Richard Whitehead was when you first observed him as [6] you came on the scene.

A. Okay, the body was lying on its back; its arms kind of up behind him; he was dressed in blue jeans, blue cotton type track jacket. I forget what color shirt it was; a pair of track shoes; the shirt was somewhat pulled up over his stomach; the jacket was pulled off of one arm and was lying under the victim who was totally involved with rigormortis.

Q. Were there any scenes of trauma that had been inflicted upon the body, external trauma?

A. There were two noticeable wounds, one right behind the left ear in the bone right behind the left ear and one right between the eye.

Q. Okay.

A. And the nose, bridge of the nose.

Q. Alright. After you secured the scene and you conducted your crime scene search and investigation what did you do with the objects that you found?

A. I seized the objects and marked them as evidence. I have submitted the projectile, the two shell cases, to the lab, and I have the Coors beer cans locked up in my safe at the office.

Q. Okay. After you completed your investigation there at the scene, what did you have done with the body of Richard Whitehead?

[7] A. The body was picked up by Texarkana Funeral Home and was transported to Dallas to the forensic lab, Southwestern Institute of Forensic Science in Dallas at Parkland Hospital.

Q. Was that under the order or instruction of a magistrate here in Bowie County?

A. Yes, sir, I believe it was Judge Dunn's order.

Q. Okay. Now, have you received a final autopsy report back from them at this time or only a preliminary autopsy?

A. Just a preliminary at this time.

Q. Okay. What did the preliminary autopsy report reveal?

A. The preliminary autopsy report revealed that the victim had been shot three times; had been shot once in the right shoulder, once behind the left ear and once between the eyes. As far as any other reports or any other lab analysis or anything back as far as the authopsy I don't have any right now, but that's what their finding was, he was shot three times.

Q. Did they find that the cause of death was a gunshot wound to the head?

A. Yes, sir.

Q. Now, after you completed your on-the-scene investigation and had seen to the moving the body to the [8] forensic science lab, what if anything, did you do next in relation to this investigation?

A. We started back tracking the movements of the victim. I talked to Jerry Hamilton, the Chief. The boy was reported missing Saturday morning as a runaway or as a missing person. His mother had reported him to several police agencies here in town. We started checking back with her and talked to Jerry. Jerry Hamilton said that several people had seen him on Friday night. He had been out on a date Friday night. We, then, contacted the girl he was out on a date with and talked to her.

Q. Okay, what was her name as best you recall?

A. I've got it here if you'll just wait just a minute.

Q. Okay.

A. Patricia Hicks.

Q. Did Patricia Hicks relate anything to you in your investigation that led you to focus upon any particular person as a suspect in this murder case?

A. She related the incident or the order of what they did on Friday night, the last night that he was seen alive. Would you like for me to go into it in detail?

Q. Go ahead.

A. Okay, she, uh, this is from memory. She stated that Richard Wayne Whitehead had called her about [9] 5:30 on Friday, which, I believe, would have been the 12th, and wanted her to go with him riding around that night. So she said, "Okay." So Whitehead picked her up at about 8:30 at her residence and they went riding around to several places in Texarkana. One place was Texas High. One place was the skating rink. About 10:30 or a little after 10:00 they went to the College Bowl Bowling Alley. The vehicle they were in was a green 1969 Mustang with black vinyl top, a rust primer hood and a black fender. The Mustang was having problems with the alternator not charging or keeping the battery charged, and then when they would turn it off, they would have to get it jumped to start it, unless they had let it run with the lights off to charge it up. So they went to the College Bowl, went inside; talked to several people, came back out; tried to get the car started; the car wouldn't start. Mr. Whitehead went back in the College Bowl; borrowed a set of keys from one of his friends, came back out, and moved this other individual's car over there a started his. There was a black male standing at the foot of the stairs at the College Bowl at that time. The black male came over and talked to Richard about the car and they got it started and then Richard was walking back inside to take the keys back in. He came back out the black male talked to him again. Then Richard and the black male came to the vehicle, uh, Patricia Hicks advised that she [10] asked what was going on and Richard said, "We're going to take this boy home." And that he lives in Nash. So, uh, the black male got in the car in the back seat,

Patricia's the passenger, Richard was driving. They went to the Rawleigh Burger on Highway 82, cashed a $20.00 dollar bill into change. The black male gave Richard $3.00 to take him home. They pulled out and the black male asked them if they drank beer. Patricia's fourteen and Richard was sixteen. They said, "Yes, they drank beer occasionally." The black male said, "I'll go buy you some beer." They went to the Sportsworld on North Stateline, I believe, is the name of it. The car, when it would run for a while, the headlights would get dim and they would have to pull off, turn the light off and race the motor to get the battery charged back up. They bought, uh, two six-packs of Coors beer. The black male went out or went into Sportsworld and bought two six-packs of Coors beer, came back and got into the car; they drove down the Interstate back toward Nash. They had to pull off the Interstate, uh, the headlights were getting dim again. They pulled off the Interstate on to Summerhill Road at the Texaco Station and let the motor charge the battery up. The black male says, "We're going to get stopped. If I get caught with you with all this beer, I'm gonna go to jail. Let go out to Nash. I know a place where we can drink some beer and the police won't stop us, [11] or the cops won't mess with us." And so they took off to Nash from here. He lead them down to this park, it's an abandoned park in Nash. He had made a statement enroute that he had a stash out there if they ever needed any dope.

Q. Who made that statement?

A. The black boy did.

Q. Okay.

A. Okay. So they went to the park, uh, when they got to the park they backed up. The black male said, "You need to back down in here where Cecil can't spot us, if he comes in here." He didn't say police officer, he said, "Cecil" and that's the City Marshall of Nash. So they backed off down in there and they turned the car off. The little girl said she got worried because she didn't think the car was going to start, and told

Wayne that she didn't think the car would start and the black male said, "Well, don't worry if the car won't start, I just live right over here and I can go get my mother's car and bring it back and start it." They had their own jumper cables. So Patricia Hicks related to me that this black male and white male got out of the vehicle, walked around behind the car, and went off in the woods; stayed about three or four minutes and came back. And that Wayne told her that they couldn't find it. She just assumed they were talking about the stash. So they all sat on the hood of the can and they [12] chug-a-lugged two twelve ounce cans of beer, all of them did, of Coors Beer, and then the black male walked back out with the white male into the woods, came back and they drank some more beer. So, she got worried about what time it was and asked Wayne what time it was. He told her, I believe, it was ten after eleven or somewhere along in there. She had to be home at 11:00 she told him, and the black male said, "No, let's go back out there one more time and see if we can find the stash." And Wayne said, "No, I've got to get her home." The black male, the victim and Patricia Hicks got in the vehicle, started it up and carried her home. When she got out of the car at her house, Wayne told her they were going to get a flashlight and go back and see if they could find the stuff. That was the last time she saw him. Okay, you want me just to go on through the investigation or what?

Q. Right, yes.

A. Okay, 'cause we interviewed her again later. After that the movement was tracked to a girl's house named Patty Bungart. She stated that at about 11:30 or a quarter till twelve that Friday night that Wayne Whitehead and an unknown black male came to her residence and knocked on the door and wanted to use her restroom; that she knew him, uh, that she knew Wayne from, uh, well, she knew Wayne from working with him at Bonanza on State Line. So, she [13] let them in and they shot the bull a while and then they got ready to leave and this was about a quarter after 12:00. They went

back out to get in the car, the car wouldn't start so they had to use her car to start it. The black male was the one who put the jumper cables on it. Then she said they drove off and that was the last she had seen or heard of them after that. She said she didn't know the black male, but that his face was familiar. We reinterviewed Patricia Hicks. Patricia says that while they were enroute to the place in Nash that Wayne asked the black male, if he didn't know him. The black male says, "I don't think so." He said, "Well, didn't I work with you." Wayne asked the black male if he didn't work with him and the suspect asked him, "Where did you work last." Wayne said, "I worked at Bonanza, back in October," somewhere along in there. I'm not very sure about when it was. Then he says, "Oh, yes, you worked in the back." And Wayne was a bus boy, and then they remembered that they knew each other or that they were familiar with one another. They had only worked together maybe a week or two. So we contacted the manager at Bonanza. Patricia Hicks had given us a description about the black male having a tooth out in front of his mouth; being light skinned and not real thick hair and was wearing a blue set of coveralls. A new style coverall, this is not the kind that's got the hammer deal in the side, and a jacket. And that was the [14] description that Patricia gave us. We went to the manager of Bonanza, and asked him if he remembered the black male matching that description that worked there. He didn't right off the bat, so he started looking through his personnel records. We came up with the name of Delmar Banks. Delmar was described to me by the manager as having a tooth missing in front of his face, being a light skinned black male. We then located a Annual. This was a 1977 Annual for Texas High, located a picture of Delmar Banks on a page in the Annual, carried the annual to Patricia Hicks, had her look through six or seven pages of the Annual. She came to Delmar Banks' picture and identified him, positively, as the one that they picked up at the College Bowl. Carried the Annual to Patty Bungart. She went through the

same six or seven pages and identified Delmar Banks as the suspect or as the individual that came to her house at 11:30 or quarter to 12:00 the night that the boy come up missing. So that's how we established Delmar as a suspect.

Q. Thereafter, after that had occurred, did you have any contact with Delmar Banks?

A. No, sir. I just put him under surveillance to try to find his movements, to get some intelligence on his friends or just a basic background investigation on him.

[15] Q. Well, thereafter, after that time, he came to be arrested?

A. Yes, sir.

Q. Tell the Judge how that happened.

A. I believe, it was on a Wednesday on the 23rd of April, I received a telephone call from a confidential informant that stated that Delmar Banks was coming to Dallas to meet an individual and get a weapon. So we instituted a surveillance on him and saw him get into a vehicle, him and another black male, I believe, his name is Jefferson. They got in a white, '71 Ford or '72 or '73 model Ford. And they rode around town for a little while, then got on the Interstate heading west. I wasn't real sure they were going to Dallas or what they were doing until they got past Hooks or pretty near Hooks. I called for some assistance from Wake Village Units in an unmarked car to help us with surveillance. We followed them to Dallas, uh, around in Dallas. After a while we got some Dallas PD officers in unmarked units to help us with surveillance in Dallas. They went to a residence over in Oakcliff, pulled up to the house, the driver of the vehicle which was identified earlier, the people had had a flat, they got out and were changing the flat at the service station and we could see who the driver was. The driver was Delmar Banks. We kept the vehicle under surveillance until it went to a [16] residence over in Oakcliff, uh, the driver of the vehicle got out, went to the front door of the house, knocked on the door, another black male came to the door. They stood at the door and

talked a few minutes, the driver of the vehicle left stuffing something in his pants; climbed back in the car and left. They got lost several times leaving Dallas. Went through the medium, went backwards on the exit ramp and they were lost. We had Dallas PD stop the vehicle for traffic violations. There was a pistol, a 22 pistol found on the front seat of the vehicle next to the—in between the driver and the passenger and there was some narcotic paraphernalia found. The suspects were then taken to the Dallas Police Department and charged with—I'm not sure I don't have my file with me what they had them charged with.

Q. In any event when this weapon was found, did your investigation end there or what did you do next?

A. No, we located this weapon through contact with the lab and knew that the victim had been shot with a 25 caliber. The projectile had six linear grooves with a right hand twist. They advised that it would be not a common type of pistol like a Titan or a Browning or anything like that. We knew that the 22 wasn't the weapon.

Q. You knew it was not the weapon?

A. We knew it was not the weapon.

Q. What, if anything, did you do after that?

[17] A. We went back to this residence in Oakcliff; got the people up; talked to a black male there who's name was Charles Cook. He advised me Delmar Banks had just left his house that he had given him a 22 pistol. Well, he didn't say anything as to why or what. He also said that Delmar had left a 25 automatic with him approximately a week and a half to two weeks before then. I recovered the pistol from him, the 25 automatic, carried it to the lab in Dallas and it was positively matched with the bullets in the body, and the bullet that I located and the hulls at the scene. It had been the weapon that killed Wayne Whitehead.

Q. Were you advised by Mr. Cook or someone else there at Dallas, that Banks had been driving the Whitehead automobile that '67 Mustang you told us about?

A. Yes, Mr. Cook advised that he met Mr. Banks standing on the street corner about 9:00 o'clock or 8:00 o'clock on Saturday morning the 13th and that this black male in a fast green Mustang with the fenders messed up come up to the bus stop, stopped him and wanted to know where there was a motel to stay. That he didn't have much money and wanted to stay in a motel. And he befriended him and told him he would take him around and show him some places to stay, if Delmar would take his wife to work instead of making her ride the bus.

Q. Did the vehicle that he described to you, that [18] Banks' was driving at that time, match the description of the vehicle belonging to the Whitehead youth?

A. Yes, sir, it did.

Q. Okay. Has that vehicle ever been recovered?

A. No, sir. Not yet.

Q. Okay. You submitted the pistol to the lab in Dallas, I believe, you said?

A. Yes, sir.

Q. Okay. And they then told you that, the lab people did, that it was positively the weapon that had fire the bullet that had killed the Whitehead boy?

A. Yes, sir.

Q. After Banks was taken into custody in Dallas, was he then transported back to Bowie County?

A. Yes, sir. The Dallas PD took him into custody, I think about 4:00 or a little after 4:00. They were arraigned before a City Judge in Dallas and a little after 8:00 we, uh, brought him back to Texarkana the same day. I think, we got back here about 3:00 o'clock.

Q. Okay. After he was brought back here, was he arraigned before a magistrate in Bowie County?

A. Yes, sir, he was.

Q. And based upon that arraignment and the information presented to that magistrate, what charge was filed, if any, against him at that time?

[19] A. In Bowie County we filed, I filed. . .

Q. Here in Bowie County.

A. Capital Murder.

Q. Based upon the information furnished to the Judge or the Magistrate and the complaint, was bond denied on Delmar Banks for those charges?

A. Yes it was.

Q. Pass the Witness.

[20] CROSS EXAMINATION

BY MR. COOKSEY:

Q. That bond was denied, wasn't it, Deputy, without a hearing?

A. The bond was denied at the Miranda Warning Hearing.

Q. A Miranda Warning hearing?

A. The Magistrate's warning, statutory warning by the Judge.

Q. Well, the Judge denied that bond without hearing any evidence, didn't he?

A. Yes, sir.

Q. Now, you filed a capital murder charge?

A. I signed a complaint, yes, sir.

Q. Alright. Was the deceased robbed?

A. Yes, sir, of a vehicle and some money that's undetermined at this time.

Q. You don't know how much?

A. No, sir.

Q. Where is the 25 caliber pistol?

A. It's still in the lab in Dallas.

Q. I noticed that you have been refreshing your memory from some notes there. Could I see them, please?

A. I've got some things in here I haven't testified on.

[21] Q. That doesn't matter, you used it to refresh your memory.

BY MR. ATTAWAY:

Judge, unless he has a specific use for it, we're going to object to him just taking the notebook there. If he has a specific .. .

BY MR. COOKSEY:

The witness used that document to refresh his memory and I'm entitled to see it.

BY MR. ATTAWAY:

Judge, that's not true. Now only portions of it has he used. If he wants to draw his attention to that particular part of it, that's fine.

BY MR. COOKSEY:

I don't have photostatic recall, Judge. I can't recall everything he has said.

BY MR. ATTAWAY:

Well, Judge, we'll object to him getting those. Those are his investigative notes and he's used only parts.

BY THE COURT:

He's not got a right to look at all of them, but he can refresh his memory by re-reading it to Mr. Cooksey, whatever he asks him. But he might have different notes on the same page.

BY WITNESS:

[22] I really have different cases on different pages.

MR. COOKSEY:

Q. All I'm interested in is what you looked at when you were testifying.

A. Well, I testified to what I looked at.

Q. Well, show that to me.

A. Well, right here is Patricia Hicks' name.

Q. Alright. Her address is 701 Bluebird, Apartment 5, Wake Village?

A. I think that's Patty Bungart.

Q. Patty Bungart, what's her address?

A. 1715-112 New Boston Road. I believe that's it.

Q. What about the address of Charles Cook? Did you look in there and see about Charles Cook?

A. No, sir. Nobody asked me his address.

Q. Well, what is his address?

A. 1734 Marsailes.

Q. Is that Dallas, Texas?

A. Yes, sir.

Q. Is he known as 'Tu-Tu'?

A. Yes, sir.

Q. He's been to the joint twice?

A. I'm not sure about that. I couldn't testify [23] whether he had or not.

Q. Did you run this pistol on NCIC?

A. Yes, sir, we did.

Q. Well, what did you find out?

A. There was no record at that time.

Q. Have you found a record since then?

A. I hadn't run it again.

Q. Did you check any kind of registration on the pistol?

A. It's an old Galasie Italian, I believe it's an Italian model pistol. It was pitted and rusted.

Q. Did you check any kind of registration on the pistol?

A. No, sir, not yet.

Q. Are you still looking for the vehicle?

A. Yes, sir.

Q. What's Charles Cooks' wife's name?

A. I don't believe he's got a wife.

Q. I thought you said that he was taking his wife to work.

A. He's got, uh, they're not married.

Q. Well, his girl friend's name?

A. I believe it's Marie.

Q. What's her last name?

A. I'd have to look, and I just as soon not have [24] to show you my notebook.

Q. Well, look.

A. Marie Martin.

Q. Have you interviewed her?

A. Yes, sir.

Q. Did she ride to work with Delmar Banks?

A. Yes, sir.

Q. Where does she work?

A. Hyatt Regency.

Q. Did she confirm the Mustang story?

A. Yes, sir.

Q. Who is that Mustang registered to?

A. It's registered to, I believe, Mr. Whitehead, Larry Whitehead, the boy's daddy.

Q. Do you have the license number?

A. Yes, I've got it. I know, uh, the last numbers are 148, now, I don't remember. I can't find it, yeah, I got the tag number and the VIN number.

Q. Have you put both out on NCIC?

A. Yes, sir, I have.

Q. And you've not recovered the vehicle?

A. No, sir.

Q. Was your confidential informant that told you that Banks was going to Dallas a local person or one from Dallas? [25] A. Sir, I don't believe I'll answer that.

BY MR. ATTAWAY:

Judge, we'll object to that. Now, that's privileged under the law as to who our confidential informant is or any of the facts around it.

BY MR. COOKSEY:

I didn't ask him who it was.

BY MR. ATTAWAY:

Well, he's not entitled to know facts in which he can derive the name of the informant either, so, we'll object to any questioning concerning that confidential informant other than what he told him.

BY MR. COOKSEY:

Your Honor, I'm entitled to know how reliable his confidential informant is.

BY MR. ATTAWAY:

Judge, he's not entitled. We didn't get a warrant based upon his testimony.

BY MR. COOKSEY:

The reliability I can challenge, and if he's a guy in Dallas that's never dealt with him before I'm entitled to know that.

BY MR. ATTAWAY:

Judge, we didn't get a warrant based on the informant's testimony or his statement so he's not entitled [26] to know anything about him, other than what he said.

BY THE COURT:

Okay. The objection is overruled.

BY MR. COOKSEY:

Q. Was he local or in Dallas?
A. Sir, I'm sorry, I'm just not going to answer it.
Q. Well, the court has overruled the objection.
A. I'm sorry, I just can't.

Your Honor, would you instruct the witness to answer the question.

BY THE COURT:

Go ahead.

BY MR. ATTAWAY:

Do you agree that they're not entitled to have the information concerning our informant?

BY MR. COOKSEY:

I'm not asking who it is, Judge.

BY MR. ATTAWAY:

It's information from which he can derive the name of the informant.

BY MR. COOKSEY:

Surely, he's got more than one in Texarkana.

BY MR. ATTAWAY:

He may have a whole bunch of them, Judge, but [27] they're protected under the law. The disclosure of their names or information leading to their identity is privileged. He's not entitled to it and I object to it.

BY MR. COOKSEY:

I'm not asking that, Judge.

BY MR. ATTAWAY:

I object to any questioning about him except what he told him.

BY MR. COOKSEY:

I'm not asking who it is. I want to know if it is a man that is local, let's say Bowie County.

BY WITNESS:

I still can't answer it, Mr. Cooksey. I'm sorry.

BY MR. COOKSEY:

Your Honor, I'm entitled to know that.

BY MR. ATTAWAY:

He's not.

BY THE COURT:

Objection sustained.

BY WITNESS:

I'm sorry. I can't answer that.

BY MR. ATTAWAY:

You don't have to answer is what the Judge is telling you.

BY MR. COOKSEY:

[28] Q. How did you first make contact with Charles Cook?

A. We went back to his residence in Dallas.
Q. Well, what led you to it?
A. Following the suspect.
Q. Was he the one that went to the door?
A. The suspect?
Q. Yes.
A. Yes, sir.
Q. Was he the one driving the car?
A. Yes, sir.
Q. Was this decedent found within the territorial limits of any city in this county?
A. There's some-I don't know. Uh, he was found in Bowie County that's all I care about as far as where he was found. He was outside the Nash City Limits. Texarkana said he was outside their city limits and Wake Village said it was outside theirs. The park is property of the City of Texarkana.
Q. Alright. The reason I was asking, you got assistance from Wake Village Police.
A. Yes, sir.
Q. But it was outside their City Limits?
A. Right. The victim was from their city.

Q. Okay. Have you run any tests on the beer [29] cans?
A. It had rained and snowed. It snowed and rained and it was inclement weather the whole weekend. There was contacts made with the lab and they said it would be futile to send them in.
Q. So the answer to my question is no, you have not run any tests.
A. Right.
Q. Have you received a written ballistics results?
A. Yes, sir.
Q. Do you have that with you?
A. No, sir, I don't.

BY MR. ATTAWAY:

We will furnish that to Mr. Cooksey, Judge.

BY MR. COOKSEY:

Alright, sir.

Q. Have you received a written autopsy report?
A. No, sir. Just a preliminary cause of death report.

BY MR. ATTAWAY:

Likewise we'll furnish a copy of that to Mr. Cooksey and when the full autopsy report comes in, we'll furnish that, too.

BY MR. COOKSEY:

That's fine, Your Honor.

[30] Q. Was there anyone smoking marijuana on that night that Patricia Hicks told you about?
A. No, sir. Nobody ever smoked any.
Q. They were just looking for some?
A. Yes, sir.
Q. And they never did find it?
A. According to what she said, they didn't.
Q. What about Patty Bungart?
A. She never said anything either way.

Q. Who transported Mr. Banks back from Dallas?
A. I did.
Q. Was Wake Village still in assistance?
A. Well, they were there, they didn't—He was in my vehicle.
Q. Where did you file your complaint?
A. Here in Bowie County.
Q. Where?
A. Judge Dunn's office, I believe.
Q Okay. That's all I have, Your Honor.

BY MR. ATTAWAY:

That's all we have, Judge.

BY THE COURT:

I just want to ask one question. Because of what evidence that's been presented here is this case going to the Grand Jury tomorrow?

[31] BY MR. ATTAWAY:

It will be presented tomorrow, Judge, so I have been informed by Mr. Raffaelli.

BY THE COURT:

Because you haven't presented a lot of evidence here, but since it is—you informed me that it is going to the Grand Jury tomorrow . . .

BY MR. ATTAWAY:

That's correct.

BY THE COURT:

. . . I'm going to order that he be held to the Grand Jury without bond, because it's just one more day. That's on your testimony that it is going to the Grand Jury tomorrow.

BY MR. ATTAWAY:

I'll present an Order for you, Judge.

BY THE COURT:

Okay. Court's dismissed.

STATE OF ARKANSAS)
)
COUNTY OF MILLER)

I, Grace Baker, a Notary Public and Reporter in and for Miller County, Arkansas, certify that the above and foregoing thirty-one pages contain a full, true and correct transcript in question and answer form of all the evidence adduced upon the hearing of said Examining Trail of the above entitled and numbered cause.

WITNESS MY HAND this the 5th day of June, 1980.

_____

Notary Public in and for Miller County, Arkansas

WE AGREE THAT THE above and foregoing thirty-one pages contain a full, true and correct statement of all the evidence adduced upon the hearing of said Examing Trial of this cause, and we further agree that this record shall be filed as the Statement of Facts in this cause.

_____

District Attorney's Office
505 West Fifth Street
Texarkana, Texas 75501

FOR THE STATE

_____

Lynn Cooksey
Attorney at Law
414 Texas Boulevard
Texarkana, Texas 75501

FOR THE DEFENDANT

TRIAL TRANSCRIPT (Portions)

MR. RAFFAELLI: Ladies and gentlemen, my name is Louis Raffaelli. I previously introduced myself to you and I think we have met, but again I want to state my name to you. Seated at the counsel table here in the blue suit is James Elliott. He is an Assistant in the office, and it will be our privilege and duty to represent the State of Texas and the people of this county in this matter. We're going to prove to you beyond a reasonable doubt that Delma Banks killed Richard Wayne Whitehead during the course of robbing him of his automobile. That Richard Wayne Whitehead was shot three times: once in the back, once in the back of the head, and finally right between the eyes.

As His Honor has told you, capital murder is the killing of a human being during the course of robbing him, committed by the defendant. Now as I tell you, the State does not have an eye witness; however, when you look at all the evidence, and that is the evidence of the witnesses, pictures, the physical evidence, the scientific evidence, we will prove to you beyond a reasonable doubt that Delma Banks did kill Richard Wayne Whitehead during the early morning hours of April 12, 1980, and robbed him of his automobile.

In order to help you understand the evidence, I will go over the case with you and break it down into categories in order that you can see how the pieces fit together.

We will show you that Richard Wayne Whitehead was a young man who was killed on April 12, 1980, in Bowie County, Texas, and that at the time of his death, that his automobile was taken from him. That he was robbed.

First we will go back and we will track the last night or Richard Wayne Whitehead's life. In order to show you what happened that night, we will call three witnesses. We will call Patricia Hicks, Patty Bungardt, and Mike Fisher. Patricia Hicks, I believe, will show you that she had a date with Richard Wayne Whitehead that night. That she and Richard

Wayne went looking for his girl friend and her boy friend. They went to Texas High, they went riding around, they went by the College Bowl. Now when they were at the College Bowl. . .

* * * *

MR. RAFFAELLI: As I said, Patricia Hicks and Patty Bungardt will show you the last night of Richard Wayne Whitehead. Mike Fisher will show you that he heard several shots that early morning hours. The second phase of the case will be brought to you by the investigating officer, Willie Huff. Officer Huff would show you that he investigated the scene, and that he found some items there at the scene. That he continued his investigation. That because of his investigation, he had learned that Delma Banks was the last person known to be with Richard Wayne Whitehead. That he placed a surveilance upon Delma Banks. That due to this surveillance—this surveilance lasted for several days and due to this surveilance, they learned that Delma Banks was going to Dallas, Texas, with two other black men, and they followed them to Dallas, Texas.

I think the evidence will show you that at the time they were in Dallas, Texas, that they arrested Delma Banks, and that they continued their investigation and that they recovered a pistol, and that this pistol was forwarded to the laboratory.

Now the next category of people that we will have will be Charles Cook and his family, and they will show you that Delma Banks arrived in Dallas, Texas, during the early [1959] morning hours of April 12th, approximately 8:30. Mr. Cook and members of his family will explain to you in detail, and I'm not going to go into the detail, but they will explain to you what happened that Saturday, Sunday, and Monday that Delma Banks left Dallas.

The testimony of Charles Cook is an important witness. He will show you two things: first, that Delma Banks was

driving a green Mustang with distinct markings; and second, he will show you that the car belonged to Richard Wayne Whitehead. They became friends, they spent the next two days and nights together with members of his family. Now this man, Charles Cook, has a bad past. He has been to prison. He has two prior convictions. The proof will show you that even though they never knew each other, that he took Delma Banks in, that he tried to help him and they became friends. Charles Cook is a very important witness for two reasons. First, because Delma Banks admitted to Charles Cook that he killed Richard Wayne Whitehead and robbed him of his automobile. Second, because Delma Banks left the murder weapon and the stolen vehicle with Charles Cook.

I'm not going to go into detail now, as I said, but before they went to bed that night, Charles Cook and his wife spent the night in his home, with Delma Banks upstairs and before they went to bed that night, Charles Cook saw Delma Banks sitting on the bed, looking depressed. Charles Cook asked him what was wrong, and Delma Banks confided in him and told him that he had killed a boy in Texarkana and had robbed him of his automobile. When you see Charles Cook, I think you will see he is much older, or older, and more mature—a more mature man. Charles Cook told him he had been to prison and that Delma Banks could talk to him, could confide in him. Charles Cook will show you everything that occurred during those three days Delma Banks was in Dallas. The end result is that Delma Banks left the murder weapon and a car with Charles Cook. I think the evidence will show you that Charles Cook paid to put Delma Banks on the bus and send him back to Texarkana because he had promised to turn himself in. Charles Cook told you that he—will tell you that he took the automobile. . .

* * * *

MR. RAFFAELLI: I think the testimony of Charles Cook is critical, and I think that you will look at it and you will fully be able to see the complete picture of what occurred.

Now the next witness to come here and that you will hear from, I anticipate, will be Bennie Jones. Bennie Jones is a person who lives in Dallas, Texas, who purchased a .25 automatic, and that pistol was recovered from him. We will have additional witnesses of the Cook family that will corroberate the various details of Charles Cook's testimony.

You will hear from members of the Delma Banks family, and they will tell you that they went to Dallas, Texas, with Delma Banks to get his pistol which he had left with someone that they didn't know. You will hear experts in this case. You will hear an expert who performed the autopsy and he will tell you that Richard Wayne Whitehead was killed, was shot with a .25 caliber automatic pistol, and that he recovered two projectiles and he forwarded them to . . . .

MR. RAFFAELLI: Let me just state it to you as simply as I know how. First, is that Delma Banks killed Richard Whitehead on April 12, 1980, and robbed him of his automobile. We will prove those things beyond a reasonable doubt, I believe the evidence will show. Second, that he took the automobile to Dallas, Texas; that he met Charles Cook and admitted to him that he had killed the boy. Third, that he left the murder weapon and the Mustang with Charles Cook in Dallas, Texas. Fourth, that he returned to Dallas, Texas, a short time later in order to get the gun back. Fifth, that he was arrested; by retracing his steps in Dallas, Texas, the officers who arrested him recovered the murder weapon. I think you will see that this is a serious killing and that there was no need for Richard Wayne Whitehead to die. Delma Banks did kill Richard Wayne Whitehead, as he said, just for the hell of it. I think the evidence will . . .

* * * *

MR. RAFFAELLI: Thank you, Your Honor. Mr. Cooksey, ladies and gentlemen of the jury, as I was saying a minute ago, I think the evidence will prove beyond a reasonable doubt that Delma Banks did kill Richard Wayne Whitehead and robbed him of his automobile. At the conclusion of the evidence, the State will ask for a finding of guilty as to capital murder. Thank you.

THE COURT: Does the defense wish to make an opening statement at this time?

MR. COOKSEY: Your Honor, as per our rules of the court, I would request of the court that I be allowed to make an opening statement after the State has concluded its case.

THE COURT: You may do so then.

MR. COOKSEY: All right sir.

* * * *

ROBERT FARR

* * * *

DIRECT EXAMINATION

BY MR. RAFFAELLI:

Q. State your name, please, sir.
A. Robert Farr.
Q. And, Mr. Farr, do you know Delma Banks?
A. I do.
Q. How long have you known him?
A. About two and a half or three years.
Q. Okay, and are you any kin to Mr. Banks?
A. Well, not really. No. He is—goes with my wife's sister.
Q. Okay. Could you—would you recognize Delma Banks if you saw him?
A. I would.

Q. Do you see him in this courtroom?
A. Yes, I do.
Q. Could you point him out to us, please, sir?
A. Right there (indicating).
Q. Okay, sir. I would have the record reflect that he has identified Delma Banks.

THE COURT: Is that the gentleman—well, how is he dressed?

A. He has a blue shirt on.

THE COURT: All right, the record may show that the witness identified the defendant.

Q. Mr. Farr, did you have an occasion to go to Dallas, Texas, with Marcus Jefferson and Delma Banks?
[2099] A. I did.
Q. Approximately when was that?
A. I don't recall, but it has been a few months ago.
Q. Okay. At the time you went, do you know where you went to in Dallas?
A. Yes, I do.
Q. Where was that, sir?
A. We went to a fellow by the name of Two-two's house.
Q. Did you know that fellow?
A. No.
Q. Have you ever seen him?
A. No.
Q. Okay, did you see him that day?
A. Well, I saw him but he was on the porch and it was dark. He came out, and that's all I saw.
Q. Did you talk to him?
A. No.
Q. Okay. Who, if anyone, talked to Two-two that day?
A. Delma talked to him.
Q. Of the three of you?
A. Delma.

Q. Okay, how long did he talk to him?
[2100] A. I would say between five and ten minutes.
Q. What did he do at the end of that conversation?
A. He came out to the car with us.
Q. Okay, where was that conversation at?
A. The conversation he had with Two-two?
Q. Yes, sir.
A. It was in the car. No, it was on the front porch of the house.
Q. Okay, sir, and at the time he left, did Delma Banks make any statement concerning his conversation with Two-two?
A. No, he didn't.
Q. Did he make any—do you know if he picked up any object while he was there?
A. Yes, I do.
Q. Okay, sir. Did he make a statement concerning that object?
A. Yes, he did.
Q. What was that statement, sir?
A. He said that his gun was in West Dallas, and Two-two gave him a .22.
Q. Okay, sir. Pass the witness.

[2101] CROSS EXAMINATION

BY MR. COOKSEY:

Q. Robert, you got a nickname?
A. No.
Q. You don't have?
A. No.
Q. You been to the joint?
A. No, I haven't.
Q. Never been to the joint?
A. No, I haven't.
Q Not even in California?
A. No.

Q. I noticed when you walked in, you've got track marks, haven't you?

A. Yes, I have.

Q. Show the jury your track marks?

A. Right here? Right there (indicating).

Q. What are you shooting, Robert?

A. I was shooting Dilaudid.

Q. Shooting Dilauded?

A. Yes, I was.

Q. Disolve it in water and shooting it?

A. Yes, sir.

Q. How long have you been strung out on Dilaudid?

[2102] A. Well, I got hurt in 1973, and the doctor strung me out and I started shooting it.

Q. What else do you shoot?

A. Well, at one time I was shooting Heroin.

Q. You got strung out on Smack, too, didn't you?

A. No, I did not.

Q. How long did you shoot Smack?

A. Maybe six months, because I had no reason to shoot Smack because the reason was that I had a supply of Dilaudid.

Q. You had a supply of Dilaudid?

A. Yes, I did.

Q. Robert, the truth of the matter is you know Two-two, don't you?

A. No, I do not know Two-two.

Q. His wife is from here, Robert.

A. I do not know Two-two or his wife. The first time I saw Two-two was when he came out on the front porch that night.

Q. Have you seen him since that date?

A. No, I have not.

Q. You just happen to remember his name?

A. That's all.

Q. Do you know why they call him Two-two?

[2103] A. No, I do not.

Q. Have you ever been busted for possession of drugs?

* * * *

Q. How long has it been since you shot up, Robert?

A. About three months.

Q. About three months?

A. Right.

Q. And have you ever taken any money from some police officers?

A. No.

Q. How long have you been fooling with drugs, illegal drugs?

A. How long?

Q. Yes, sir.

A. Are you talking about hard drugs?

Q. Yes, sir.

A. Ever since 1973.

Q. What other kind of drugs are you fooling with besides hard drugs?

A. Only Marijuana.

Q. Smoking a little bit?

A. Yes.

Q. Smoke some joints?

A. Yes.

Q. Are you holding now, Robert?

A. No.

Q. You're not holding where you live?

A. No.

[2104] Q. I see, and police officers promised you anything?

A. No, they have not.

Q. . . . to get you up here and say you don't know Two-two?

A. No, they have not, but your investigator tried to get me to commit perjury and I told him I would not do it.

Q. I figured you were going to say that, Robert. I figured you were.

A. Well, it's the truth.

Q. You know what, Robert? I want to ask you. You see, this jury is entitled to know, because you just sat here and you have admitted that you have been doing drugs, hard drugs, since '73, haven't you?

A. That's right, but it wasn't at my joint.

Q. Nothing has ever happened to you, has it, Robert?

A: No.

Q. That's all.

* * * *

RE-CROSS EXAMINATION

BY MR. COOKSEY:

Q. Well, Robert, did you ever give any police officers a statement?

A. In what way?

Q In anyway?

A. No.

Q. You never did?

A. No.

Q. Who did you talk to? What police officers [2108] did you talk to about this?

A. I have talked to no one about this, outside of when they called us down referring to the case.

Q. Who called you down?

A. When the District Attorney called us down to talk about the case.

Q. When was that?

A. That was about three or four days ago.

Q. Okay.

A. But there was no statement given. That's what it was, and I told him all I knew, and that's what it was.

Q. Well, Robert . . .

A. . . . and I told the truth.

Q. . . . I notice you're tracking on both arms.

A. No, that's not true.

Q. Look at your right arm.

A. (witness does.)

Q. Now look at your left arm.

A. (witness does.)

Q. You don't see tracks on both arms, Robert?

A. No, because for the simple reason is I can not shoot myself with my left arm because I'm right-handed and I've always shot with my right hand. I never shot [2109] in my right arm.

Q. But you have never been in trouble for all these drugs? Isn't that right?

A. No.

Q. All right.

* * * *

CHARLES COOK

* * * *

DIRECT EXAMINATION

BY MR. RAFFAELLI:

* * * *

Q: Thank you, Your Honor. State, your name, please, sir.

[2112] A: Charles Edward Cook.

THE COURT: Can you hear all right back there? All right.

Q: Mr. Cook, where do you live?

A: 1735 South Marsailes.

Q: Okay, and are you employed, sir?

A: Yes, sir.

Q: By whom?

A: By the City of Dallas, Dallas Parks Department.

Q: Are you married?

A: Yes, sir.

Q: And do you have any children?

A: Yes, sir.

Q: How many?

A: One.

Q: How old is that child?
A: Child is three years old.
Q: Okay. Now, Mr. Cook, at that residence at Marsailes, do you have a `phone?
A: Yes, sir.
Q: What is that home phone?
A: 942-6232.
Q: 6232? Is that correct, sir?
A: Yes, sir.
[2113] Q: Now do you have a nickname?
A: Yes, sir.
Q: What is that nickname, please, sir?
A: Two-two.
Q: What does that mean?
A: My grandmother told me when I was a young kid, she used to tell me to count to ten and all I could say was, "One, two," so they just named me Two-two.
Q: Who put that name on you?
A: My great grandmother.
Q: Okay. Have you ever been convicted of a felony in this state or any other state?
A: Yes, sir. In this state.
Q: And when was that?
A: In 1972, I was convicted of assault.
Q: Okay, did you receive a punishment for that?
A: Yes, sir.
Q: What was that punishment?
A: Four year sentence in the Texas Department of Corrections.
Q: Okay, what was the other conviction?
A: Other conviction was theft over two hundred and under ten thousand, in Hurst, Texas.
Q: Were you punished for that, sir?
[2114] A: Yes, sir.
Q: And when was that?
A: In 1976, October 12th.

Q: Okay, what did you take at that time, on that theft?
A: I took six years.
Q: Okay, do you remember who you assaulted?
A: No, sir, I can't remember. That has been about eight or ten years ago.
Q: Do you remember what you stole at that theft?
A: Yes, sir.
Q: And what was that, sir?
A: I think it was some coats and a camera.
Q: Okay, did you plead guilty or were you found guilty by a jury?
A: Yes, sir, I pleaded guilty because I was guilty.
Q: A few months ago did you and your sister, Carol Cook, have a dispute?
A: Yes, sir.
Q: And were charges filed against you as a result of that dispute?
A: Yes, sir.
Q: What were those charges?
[2115] A: Arson.
Q: Are you now in jail on those charges?
A: Yes, sir.
Q: Whereabouts are you in jail?
A: Dallas County jail.
Q: Do you know an individual by the name of Delma Banks?
A: Yes, sir.
Q: Would you recognize him if you saw him?
A: Yes, sir.
Q: Do you see him in this courtroom?
A: Yes, sir.
Q: I ask you to point him out, please.
A: (Witness points.)
Q: Could you tell us what he's wearing, please?
A: Wearing a black shirt.
Q: Where is he seated?

A: White pants.

Q: Okay, ask the record to reflect that he has pointed out Delma Banks.

THE COURT: The record may so reflect.

Q: . . . as the defendant. How did—when did you first meet Delma Banks?

[2116] A: Met Delrna Banks on Saturday morning.

Q: Do you remember approximately when that was?

A: It was a week following Easter, around the 12th.

Q: How do you remember it was a week following Easter?

A: Well, because Easter was September 6th.

Q: How do you know that?

A: It was on a Sunday.

Q: Okay. Did anything unusual happen to any member of your family during that period of time?

A: Sir?

Q: Did anything unusual—did your sister or anything have anything unusual happen to them, or did you—did they do something at that time to make you remember that date?

A: No, sir.

Q: Okay, you say you first met him on April 12th, or thereabouts? Is that correct?

A: Yes, sir.

Q: On Saturday.

A: Yes, sir.

Q: Where did you first see him?

A: I saw him—me and my wife was standing [2117] on the bus stop, waiting for a bus for her to go to work.

Q: What is your wife's name?

A: Ida Marie Cook.

Q: Okay, and approximately what time of day was that, please, sir?

A: Around 8:15, 8:00 o'clock.

Q: Okay, and where was that bus stop located?

A: 1734 South Marsailes.

Q: How far is that from your house?

A: Well, it's right out-you just step out the front door.

Q: Okay, could you describe the circumstances of that meeting to us, please, sir?

A: We were standing there on the bus stop and this green and two-tone Mustang drove up, brown hood, black on one side, green on the other side, and back the side was green.

Q: Okay.

A: And this young man drove up in his car and asked me did I know where to find a cheap place to stay, and I told him that he might go right down here on Beckley and Overton Road, and he might find a place there to stay. He told me that he was from Texarkana, that he didn't know nobody in Dallas, and that he was looking for a place to stay [2118] and he was up here visiting, and maybe thinking about moving up here to Dallas, maybe bringing his wife and kid up there to Dallas, thinking about moving to Dallas. So I asked my wife did she know him, and she said no.

Q: Why did you ask your wife if she knew him?

A: Because my wife is from Texarkana.

Q: Okay, did she know him?

A: No, she said she didn't know him.

Q: Okay, what did y' all do then?

A: He asked me could I show him where this place was. I told him I was waiting for the bus to take my wife to work. He said, "Well," said, "I don't know nobody here." He said, "Could you come take me where the place is? I told him, I said, "I'm waiting to take her to work." And I said, "I tell you what, if you can take her to work for me," and he said yes, so I went in the house and changed clothes and went down to the Height Regency.

Q: Okay, you went to the Height Regency. Why did you go to the Height Regency?

A: That's where my wife works.

Q: Okay, and what did you do after that?

A: After we dropped her off, me and Delma came back to my house.

Q: Okay, let me ask you, do you know Delma [2119] by another name?

A: I gave him a name.

Q: What name is that?

A: Red.

Q: Is that a name you put on him?

A: Yes.

Q: When did you do that?

A: I did it sometime that day.

Q: Okay.

A: Instead of calling him . . .

Q: Why did you call him Red?

A: Well it's a good way for Blacks to communicate, same as if I was real dark in the face, you could call me Smoky. Just communication, I just called him Red because he is red.

Q: Okay. After you left the Height Regency, did you notice anything unusual about any of his clothes?

A: Yes, I noticed that he had some blood on his leg.

Q: Which leg?

A: Right leg.

Q: How much?

A: Oh, sprinkle of blood.

Q: Did you ask him about it?

A: Yes, sir.

[2120] Q: What was his reply?

A: He said that he got into it on the highway with a white boy.

Q: Did he go into detail?

A: He just said that—I asked him. He said he shot him.

Q: Okay, what did you do at that time or how did you feel?

A: Well, I didn't really believe him. I thought the young man was trying to impress me.

Q: You didn't believe him?

A: No, sir.

Q: What did you do next?

A: Well, went to my house and I put him in a pair of pants and a shirt and got him out of the clothes he had on, and I introduced him to my grandmother.

Q: What is her name?

A: Mrs. France Whiteurs.

Q: Okay. After you did that, what did you all do, if anything?

A: Took him over to a friend's house, and some friends house to visit my sister, that had a baby at Easter.

Q: You say your sister had a baby for Easter?

A: Yes, sir.

[2121] Q: Which sister is that?

A: Carol Nadine Cook.

Q: And did she have it a week before Easter, or when did she have that baby?

A: She had that baby on Easter.

Q: Okay. After you left—what time—do you remember approximately when you were at your sister's house?

A: Oh, around 11:00.

Q: You say it was around 11:00?

A: Around 11:00 or noon, 12:00.

Q: Where did you go next?

A: Next I went to—he wanted to take a bath and get some rest. I took him to a motel on Langston.

Q: Do you know the name of that motel?

A: No, I can't remember. You know, it was sitting on the left-hand side, right outside of Oak Cliff, past Ledbetter.

Q: Langston and Ledbetter?

A: It's on Langston, but it's sitting outside Oak Cliff out there, way out there on Langston, past Ledbetter.

Q: Okay, sir. What type of motel is that?

A: Oh, it's mainly for a motel just for six or five dollars for a couple of hours.

[2122] Q: Okay. In other words you don't have to spend the entire night there, or . . .

A: No, Sir.

Q: They'll rent you by the hour?

A: Yes, sir.

Q: Okay, approximately what time did you get there?

A: Got there around between 1:00 and 2:00 o'clock.

Q: Did you leave Delma Banks there at the motel?

A: Yes, sir.

Q: How long?

A: I left him there a couple of hours.

Q: Did you stay there during that period of time?

A: No, sir.

Q: Where did you go?

A: I went on down Langston and stopped on the corner of Langston and Keys at the feed house, and I bought my chickens something to eat and I took it home with me.

Q: How many chickens do you have?

A: At that time I had about thirty-four or thirty-five chickens.

[2123] Q: Okay, how did you get down there?

A: I went in the car that Delma was in.

Q: What time did you go back and get him?

A: I went back and got him—I went back and checked on him about forty or forty-five minutes, and the man said—I asked the man that cleans up the rooms how much time Delma had left because Delma was on the bed, asleep; and he said he didn't have long. He had about no longer than forty or forty-five minutes left. He didn't have too much longer left between then and the time the two hours was up.

Q: Okay, did you return and pick him up later?

A: Yes, sir.

Q: What did you do next?

A: Well, next we went and bought some chicken for my wife, and then went to pick my wife up.

Q: Is that approximately—what time of day does she get off?

A: She got off around 4:00 or 4:30.

Q: After you picked your wife up, where did y' all go?

A: Went back to my house and ate the chicken at my house.

Q: Tell us whether or not you asked your grandparents if Delma could spend the night with you?

[2124] A: Yes, sir, I got permission.

Q: Who did you have to ask?

A: I had to ask my grandmother first, and then I had to refer to my grandfather.

Q: Okay, did you invite him to spend the night with you?

A: Yes, sir, after I got permission.

Q: Did you all go out that night?

A: Yes, sir.

Q: Approximately what time did you get in?

A: Got in around 10:00.

Q: What did y' all do that night?

A: We rode around. I was showing him the city, and showing him different clubs and different parts of town. He said he wanted to come in and live; I was just, you know, mainly sightseeing.

Q: Approximately what time did you all go to bed?

A: We went to bed around 12:00-something.

Q: Okay, sir. Where did y' all sleep that night, you and Delma?

A: Well, my grandparents house, over there where me and my wife and my son live, it's a pretty big house and we stay upstairs, something like a little apartment, two bedrooms, bath, and me and my wife sleep in one room and my [2125] son sleeps in the other room in the corner of the top stairs.

Q: Now you said you and your wife sleep in one room and your son sleeps in one room. Is that correct?

A: Yes, sir, my son sleeps in the room to the right, on the corner.

Q: Okay. That night, where did Delma Banks sleep?

A: I let him spend the night in my son's room.

Q: Does your upstairs quarters, your little apartment in that house, does it have privacy? Does it have doors on all of the bedrooms?

A: No, it just have a door on the bath, and two bedrooms has no doors.

Q: What did you do, if anything, for privacy that night?

A: Well, to block him off from me and my wife, I put a pink spread over the door that Delma slept in, into that room.

Q: Did you notice anything unusual at that time?

A: Yes, sir, I noticed that Delma was sitting down on the bed with his head down.

Q: What did you do, if anything?

[2126] A: I asked him was anything wrong,

Q: What did he say?

A: He said, "Yeah, man," said, "I have lied to you."

Q: What did you say, if anything, when he told you that?

A: Well, when he told me that, I stepped, you know, up in the room where he was, because I was at the corner, getting ready to leave out the door, and he had a jacket over a dresser. And I said, "You lied to me about what." He said, "I have lied to you about that white boy, man." He say, "You people have really treated me nice; you really have been nice to me," and he said, "And I lied to you." I say, "What is it?" And then at this time I noticed that he had tears in his eyes, and I asked him, I said, "What's wrong, man? You can talk to me, tell me what's going on, because I've done been to prison twice, man, and I stay with my people and I can't afford no more trouble." He said, "Me and this white boy and his girl friend was riding around." He said, "This white boy took his girl friend home." He said, I—Delma said him and the white boy went in the woods together; they was drinking beer. He said the white boy went to the car to get another beer. Delma say this was when he decided to kill the white boy for the hell of it and take his car and come to Dallas. He said that he shot [2127] the white boy but he said he must have escaped him. He said the white boy turned around and

said, "Man, what's going on? What's happening? What did I do to you? What's going on?" Delma said he shot him again, and again. Delma said before he went to the car, sat down in the boy's car, he said he shot the boy again to make sure he was dead. He said then he got in his car and drove over his legs, and came to Dallas.

Q: When did he tell you that?

A: He told me that Saturday night.

Q: What were you feelings at that time?

A: Well, I was afraid and I told him the best thing that he could do was pray, because couldn't nobody help him now but God, that he was in big trouble, and I asked him what he was going to do and he said he didn't know. I said, "Well, you can't stay here now." He said to let him think about it, but I said, "You can't stay," and then that's when I noticed that Delma had a pistol.

Q: Okay, had you noticed that pistol before or is that the first time that you noticed it that night, that you were up in that room?

A: That's the first time that I noticed it.

Q: Now what did you do, if anything, at that time?

A: Well, I was afraid, and I left out of the [2128] room and told him to get him some rest, think about what he was going to do, you know. I went and laid down and watched over my family that night.

Q: Did you tell anyone about what you had just heard?

A: Well, I mentioned it to my wife.

Q: Okay. Mr. Cook, why did you not call the police or do something at that time?

A: Well, sir, I was afraid. I really didn't know what to do. I didn't know what to do.

Q: Now that was Saturday night? Is that not correct?

A: Yes, sir.

Q: Approximately what time did y' all get up Sunday?

A: Got up early Sunday morning, because it was sleeting rain and trying to find a place to stay, somewhere to go.

Q: What do you call early Sunday?

A: Around 8:00, 8:30.

Q: Okay, what did you-all do Sunday?

A: We rode around and we went to—I went to different apartments and homes of friends that I know, and I think we bought a six-pack of beer; just rode around, trying to find him a place to stay.

[2129] Q: Did you find him a place to stay?

A: No, sir.

Q: During that day do you know if Delma made any 'phone calls?

A: Yes, sir.

Q: Whereabouts was he when he made those 'phone calls?

A: He called Texarkana.

Q: Do you remember where he was when he called?

A: He called at my house.

Q: From your home?

A: Yes, sir.

Q: Do you know who he called?

A: I think he called his mother.

Q: Okay. After he got off the 'phone, did he say anything to you in regards to that telephone conversation?

A: Well, I couldn't hardly hear him talking but when he got off the 'phone, he had a little smile on his face and he said that his mother told him to come turn himself in. And I asked him was that what he was going to do, and he said yes, and he didn't have any money, so I was going to send him home.

Q: Okay, did you put him on the bus or did [2130] you send him home or get him to Texarkana that day?

A: No, sir.

Q: Why not?

A: Because I didn't have any money.

Q: Okay, and what day was that, now?

A: That was on Sunday, when I didn't have any money.

Q: What did you-all do Sunday night?

A: Sunday night we just stayed at home.

Q: Stayed there at your grandparents' house in your home?

A: Yes, sir.

Q: Okay, where did he spend the night Sunday night?

A: Sunday night he spent the night downstairs in the bedroom just before you come upstairs.

Q: Let me hand you what has been marked State's Exhibit Number Fourteen, and ask you if you can identify this, please, sir?

A: Yes, sir.

Q: When was the first time you saw that?

A: I saw this that Saturday night.

Q: Okay, whose gun is that?

A: That is Delma Banks' gun.

Q: Did you ever take that gun into your [2131] possession?

A: Yes, sir.

Q: When was that?

A: It was that Sunday night, when he was sleeping downstairs, in the downstairs bedroom.

Q: Okay, could you tell us about that?

A: Well, I told him that he could sleep downstairs because my wife was afraid, and I went downstairs and I got that pistol right there, and he wanted to know why I was taking that pistol and I told him, I said, "Man, you ought to be able to understand. I stay here with my people and I'm afraid and my wife is afraid." I said, "I'm going to take the pistol now," and I said, "You ought to be able to understand that." He said, "Yeah, man, I understand."

Q: Approximately what time did y'all go to bed Sunday night?

A: Well, it was around 9:00 o'clock. It wasn't too late Sunday night.

Q: What time did you get up the following morning?

A: I got up early the following morning, because I had to go to work.

Q: You had to work Monday?

A: Yes, sir.

Q: What time did you have to go to work?
[2132] A: I usually leave around 7:00, ten after 7:00, or 7:15, something.
Q: Did you see Delma Banks before you left that morning?
A: Before I left, yes, sir. He was there at the house.
Q: When was the next time that you saw him after you went to work?
A: When I came home from work that evening, around 4:30 or 5:00.
Q: Approximately what time?
A: Approximately 4:30 or 5:00 o'clock.
Q: What did y'all do, if anything, at that time?
A: Well, I didn't do nothing but wait on my wife to come home from work.
Q: What time does she get home?
A: She gets home around the same time I do, around fifteen until 5:00.
Q: Okay.
A: Whenever her bus arrives.
Q: Pardon me?
A: Whenever her bus arrives, around fifteen to 5:00, ten to 5:00.
Q: Does she take the bus home from downtown?
[2133] A: Yes, sir.
Q: After your wife arrived, what did y'all do, if anything?
A: After my wife arrived, went around to Hunt's Food Store and cashed her check.
Q: What did you do next?
A: And then went down to the Greyhound Bus Station.
Q: What for?
A: Because Delma's bus was leaving around fifteen to 6:00.
Q: You say his bus was leaving. Did he take the bus?
A: Yes, sir.
Q: Do you know where that bus—the destination of that bus?

A: At Texarkana.
Q: Did you see him get on that bus?
A: Yes, sir.
Q: How did he get to the bus station?
A: He went to the bus station in that Mustang.
Q: Well, what happened to the Mustang then?
A: What happened to it?
Q: Right.
[2134] A: That day?
Q: You had it at the bus station, did you not, Monday night?
A: Monday night I had it. I went home and it was parked there by my house, that Monday night.
Q: The Mustang was parked at your home Monday night?
A: Yes, sir.
Q: Did you take it home from the bus station?
A: Yes, sir.
Q: Okay. Where is the Mustang now?
A: I don't know.
Q: When was the last time you saw the Mustang?
A: Last time I saw it, it was early that Tuesday morning, when I took it and dumped it on Canada Drive.
Q: Dumped it where?
A: At the end of Canada Drive.
Q: Whereabouts is that?
A: That's in the West Dallas area, in Dallas.
Q: Is that a predominantly black area?
A: Basically, yes, sir.
Q: Okay. When did you take it there?
[2135] A: I took it there that Tuesday morning.
Q: Why did you do that?
A: Because I didn't want no part of it.
Q: You didn't what?
A: I didn't want any parts of it.
Q: Okay. After you dumped it over in West Dallas, what did you do?

A: I ran about three or four blocks and caught the crosstown, and I went to work.

Q: What is the crosstown?

A: It's a bus that go into different parts of Dallas, you know, go way out in the area. It's across town to travel, you know, from one place across town to another place, just one bus.

Q: Okay, in other words it's a bus that you caught over in West Dallas that took you back over to the Oak Cliff area? Is that correct?

A: Yes, sir.

Q: Did Delma take his pistol with him?

A: No, sir.

Q: Why not?

A: Because the pistol was still there at the house where I had hit it up under the white chest with no legs on it.

Q: You say where you hid it. When did you [2136] hide it?

A: That Sunday night, the night that I took it away from him.

Q: What did you do with the pistol?

A: I sold the pistol.

Q: Who did you sell the pistol to?

A: I sold it to a friend.

Q: Could you tell us that friend's name?

A: Name was Benny Lee Jones.

Q: How much did you get for it?

A: Ten dollars.

Q: Where did Benny Lee Jones live?

A: Across the street from me.

Q: Same block, just across the street?

A: Just right across the street.

Q: Did you sell him any other items?

A: Yes, sir.

Q: What were those items?

A: I sold him a green tool bos, and a set of battery cables.

Q: Okay, when did you sell him the pistol?

A: I sold him the pistol that Tuesday evening when I got home from work.

Q: Were you subsequently or later contacted by any law enforcement officers concerning that pistol?

[2137] A: Yes, sir.

Q: Approximately when was that?

A: About two weeks after that; two weeks or a week and a half after that.

Q: Okay, do you remember who was there?

A: No, I don't remember the name.

Q: How many?

A: Around seven or eight.

Q: Approximately what time of day was it?

A: It was early in the morning. It was around 3:30, between 3:30 and 4:00.

Q: Okay, did they request you to take to get that pistol?

A: Yes, sir.

Q: Did they ask you about a pistol?

A: Yes, sir.

Q: What did they ask you?

A: Well . . .

MR. COOKSEY: I'm going to object, Your Honor. That's hearsay.

THE COURT: Going to sustain the objection.

Q: Did you retrieve a pistol, or did you go get a pistol?

A: Yes, sir.

[2138] Q: What pistol did you get?

A: I went and got that pistol, there.

Q: Where did you get it?

A: Got it from Benny Lee Jones.

Q: Who was with you when you got it, if anyone?

A: The arresting officer.

Q: The arresting officer?

A: Yes, sir.

Q: Okay, is that the officers that came out to your house that morning?

A: Yes, sir.

Q: The pistol you got from Benny Lee Jones, is that the same pistol that you had previously sold to him?

A: Yes, sir.

Q: And that's that pistol there, State's Exhibit Fourteen, that you have identified as being the pistol that you took from Delma Banks? Is that correct?

A: Yes, sir.

Q: When was the next time that you saw or talked to Delma Banks after you placed him on the bus?

A: It was in that same week, I talked to him on the telephone, that I put him on the bus.

[2139] Q: Did you call him?

A: No, sir.

Q: Did he call you?

A: Yes, sir.

Q: Whereabouts?

A: He called me, but . . .

Q: Where were you when you got the 'phone call?

A: I was at home.

Q: What did he want?

A: He wanted to know had I got rid of the car and where was that pistol, and I told him that I got rid of it. He told me make sure that I had got rid of it because they was hot on him about that car, and make sure I got rid of that pistol. If I didn't, he wanted me to mail him that pistol.

Q: Okay, what did you tell him?

A: I asked him, "How do you mail a pistol? He said put it in a box with some cotton in it and mail it to me if you still got it. I told him okay.

Q: Did you mail him that pistol?

A: No, sir.

Q: When was the next time that you saw or talked to Delma Banks, if any?

A: I talked to him again around—it was early one morning, around 3:30 or something, before.

Q: Talked to him early one morning?

[2140] A: Yes, sir.

Q: Did you talk to him on the 'phone, or did you see him at that time?

A: Talked to him on the 'phone.

Q: What did he want then?

A: He said he needed to come and talk to me.

Q: What did you tell him?

A: I asked him for what, and he said, "Man, I need to talk to you," and I said where was he, and he said, "I ain't too far from your house." I said, "I thought you were going to turn yourself in." And he said, "Man, I can't do it. I need to talk to you."

Q: When was the next time you saw or talked to him?

A: I talked to him that Saturday morning when he came to my house, and I went down and got the door and he was standing outside the door. He said he needed a pistol and he asked me where was his pistol. I told him I had got rid of it. He said, "Well, man, I need my pistol because I got to go further." And I said, "Where are you going?" And he said, "I'll probably go to El Paso."

* * * *

Q: Is that the same morning that you saw him there at the—at your house that early morning hour, is that the same morning the police officers came and saw you?

A: Yes, sir.

Q: Okay. Mr. Cook, let me ask you to back-track just a hair. The Friday night before you met Delma Banks, where were you?

A: I was at home.

[2141] Q: Who were you at home with?

A: I was at home with my wife and my son and my grandmother and my grandfather.

Q: Did you work that day?

A: Yes, sir.
Q: Did your wife work that day?
A: Yes, sir.
Q: Did you work the next day?
A: No, sir.
Q: Did your wife work the next day?
A: Yes, sir.
Q: Did y' all go anywhere that night?
A: Yes, sir.
Q: Where did you—that Friday night, where did you go?
A: That Friday night we didn't go nowhere.
Q: Okay, you didn't go anywhere that Friday night?
A: No, sir.
Q: Okay. Have you ever been to Texarkana?
A: Yes, sir.
Q: When was that?
A: Last year.
Q: Approximately when?
A: Around the summertime.
Q: Why did you come to Texarkana?
A: Because my wife wanted me to come with her and visit her grandmother.
Q: Have you ever been to Texarkana any other time than that one time?
A: No, sir.
Q: Never have?
A: No, sir.
Q: Pass the witness.

* * * *

CROSS EXAMINATION

BY MR. COOKSEY:

Q Two-two, who all have you talked to about this?

* * * *

Q Are you known as Two-two?
A Well, my name is Charles Cook, but my friends call me Two-two.
Q You care if I call you Two-two?
A I appreciate it if you call me by my name.
Q What would you prefer that I call you?
A Charles.
Q You want me to call you Mr. Cook?
A That'll be fine.
Q Who all have you talked to about this, Mr. Cook?
A I haven't talked to anyone about it.
Q Haven't talked to anybody?
A No, sir.
Q Mr. Raffaelli just put you on the stand, not knowing what you were going to testify to. Is that what you're telling me?
A That's what I'm telling you.
Q Mr. Cook?
A Yes, sir.
Q Let's clear up a couple of things for this jury. All right?
A Yes, sir.
Q Number one, you fell in Dallas County in '72, didn't you?
A Yes, sir.
Q And it wasn't just for assault, was it, Mr. Cook?
A It was for assault.
Q It was for robbery by assault, wasn't it?
A Well, attempted robbery.

Q All right, sir, and then you fell in Ft. Worth, didn't you?
A In Hurst County; Hurst, Texas.
Q What?
A In Hurst. It happened in Hurst, Texas, sir.
Q Hurst?
A Yes, sir.
Q That's Tarrant County, isn't it?
A Yes, sir.
Q And you fell from Fort Worth, didn't you?
A That's correct.
Q That was for theft.
A That's correct.
Q I believe, Mr. Cook, that you failed to tell this jury about your drug habit. What kind of drugs do you shoot?
A I used to shoot drugs.
Q What kind of drugs do you shoot, Mr. Cook?
A I don't shoot any drugs now.
Q Why? Because you're in jail?
A No.
Q When did they put you in jail, Mr. Cook?
A I went to jail May 14th.
Q What?
A May 14th.
Q May 14th, and you forgot to tell this jury, Mr. Cook, about you being arrested and charged with obtaining a controlled substance by fraud, didn't you?

* * * *

RE-CROSS EXAMINATION

BY MR. COOKSEY:

Q Mr. Cook?
A Yes, sir.
Q You have testified in this court of law that you disposed of a murder weapon, didn't you, sir?

A Yes, sir.
Q And that you disposed of a hot automobile, didn't you, sir?
A Yes, sir.
Q Have you been charged as an accessory to a murder?
A No, sir.
Q You say that you had not been in Texarkana in a year. That's not true, is it, Mr. Cook?
A That is true.
Q Isn't it true, Mr. Cook, that you run narcotics down here to Robert Farr?
A No, sir.

* * * *

Q I guess you, like Robert Farr, you don't like my investigator, Dennis Waters, either, do you?
A I don't know Robert Farr.
Q How about Dennis Waters?
A I don't know him, either.
[2154] Q You know he was a narcotics agent for years.
A I don't know him.
Q What were you strung out on, Mr. Cook?
A I never been strung out on drugs.
Q What were you shooting?
A I was shooting Preludes.
Q How about Delaudin?
A No.
Q How about Smack?
A No.
Q Coke?
A No.
Q You did get arrested for obtaining illegal drugs, didn't you, Mr. Cook?
A I received a no-bill on that charge, sir.
Q That's what we're coming to. Have you been indicted for arson?
A Yes, sir.

Q Did they put the habitual criminal act on you?

A Yes, sir.

Q And they got you where you've got to testify, haven't they, Mr. Cook?

A No, sir.

Q You know, Mr. Cook, what does not make [2155] one ounce of sense to me is that you say, "Hey, man, I don't want to get in no trouble," and yet you dispose of a pistol, you drive a hot car around. That's not true, is it?

A That's true.

Q You're telling this jury that a man sits there and says, "I just murdered somebody," and you let him stay there in your house around your family and all of that for two or three more days?

A The man said he was going to turn himself in.

Q You didn't answer my question, Mr. Cook. You're going to let a man stay there around your family two or three days after he told you he murdered somebody?

A I was stuck with the man. The man didn't have nowhere else to go.

Q Mr. Cook, the truth of the matter is you are contacted quite often by the police, aren't you?

A No, sir.

Q How much of that time did you do on that robbery by assault? You did flat time, didn't you?

A I did two years and parole.

Q You did two years?

A Both times I paroled.

Q How much time did you do on that on your theft case?

[2156] A Two years.

* * * *

Q But you're telling this jury, Mr. Cook, that you were not in Texarkana on April 11th?

A No, sir.

Q That you were not with Robert Farr?

A I don't even know Robert Farr.

Q But at any rate I want to establish one point, Mr. Cook. You say that this man told you he killed somebody.

A Yes, sir.

Q And after that, you aid him, you assist a felon by disposing of the car and by disposing of the gun, didn't you?

A Yes, sir.

Q And you have not been charged with it, have you?

A No, sir.

Q That's all I have.

* * * *

Re-DIRECT EXAMINATION

BY MR. RAFFAELLI:

Q Have you ever testified prior to coming to this courtroom, today?

A No, sir.

Q You have never been in a courtroom and been sworn in and testified as a witness?

A This is my first time ever been in the court.

Q At the early morning hours that the law enforcement officers came to your house back in April, do you remember what day that was?

A I don't remember the date.

Q Okay, sir, Did you give a statement to the law enforcement officers at that time?

A Yes, sir.

Q Did you write that statement out, or did they tape it, or how did that transpire, please, sir?

A Well, I told them about it and then they asked—they told me they would like for me to write it down on paper down at the city hall.

Q Did you do that, sir?

A Yes, sir.

Q Were you nervous?
A Yes, sir.
Q Approximately what time of the morning was that? Do you remember?
A It was early in the morning.
Q Pardon me?
A It was early in the morning.
Q Okay. Mr. Cook, are you telling the truth?
A Nothing but the truth.
Q Complete truth?
A Yes, sir.
Q Pass the witness.

MR. COOKSEY: I have no further questions.

* * * *

(At this time the jury left the courtroom. Counsel for the parties, the Judge, the defendant and the court reporter retired to the Judge's chambers where the following proceedings were had outside the presence of the jury as follows, to-wit:)

MR. COOKSEY: Now comes the defendant, Delma Banks, Jr., by and through his attorney of record and moves the court to instruct the jury to return a verdict of not guilty for the following grounds and reasons: One, that there is no evidence tending to show the guilt of this defendant and alternatively, that there is insufficient evidence in that the State has failed to meet its legal burden of beyond a reasonable doubt in proving this defendant guilty. For the further reason that the State has injected extraneous offenses purportedly committed by this defendant. Respectfully submitted.

THE COURT: All right, and your motion is overruled.

MR. COOKSEY: Your Honor, may [2241] the record reflect that this is in the Judge's chambers with only the court reporter, Your Honor, me, and Delma Banks present?

THE COURT: The record may so reflect, and that "me" is Mr. Lynn Cooksey, the defense attorney.

(NOTE: After the motion for instructed verdict set out on Page 2240, counsel for the State removed themselves from the Judge's chambers.)

MR. COOKSEY: And of course this is outside the jury's. . .

THE COURT: And outside the presence and hearing of the jury.

MR. COOKSEY: Delma, you understand that you have an absolute right to get on that witness stand?

(ANSWERS BY DELMA BANKS, JR.)

A Yes, sir.

MR. COOKSEY: You understand [2242] that you have an absolute right not to get on that witness stand?

A Yes, sir.

MR. COOKSEY: And that with the state of the case as it is, and you have heard all of the witnesses?

A Yes, sir.

MR. COOKSEY: And you have heard my cross examination.

A Yes, sir.

MR. COOKSEY: What do you desire as far as testifying or not testifying?

A Not testifying.

MR. COOKSEY: All right, you say that you do not want to testify?

A Yes, sir.

MR. COOKSEY: All right, you understand full well, Delma, that you have the right to testify?

A Yes, sir.

MR. COOKSEY: In the event you do not testify, His Honor, Judge Pesek, will instruct the jury that they may not consider that as any evidence of your guilt, the fact that you failed to testify. You understand that?

A Yes, sir.

MR. COOKSEY: And knowing all of that, you still want to make your own election that you do not testify?

A Yes, sir, I do.

MR. COOKSEY: Now, Your Honor, are you satisfied that he knows his rights in this connection and. . .

THE COURT: Let me ask this question of you, Delma. Do you have any question that you want to ask me, as Judge of this court, or ask your attorney concerning what he is talking about?

A No, Your Honor, I fully understand.

MR. COOKSEY: And you fully understand that if we don't take the stand, now, that we will not get to take the stand in this first phase of the trial? In other words what I'm say is if we—you make a decision that you don't want to testify, then the Judge will submit the charge to the jury; give the jury its instructions.

A Yes, sir.

Q And it's too late, then. You won't be allowed to come back and say, "Judge, I changed my mind. I want to testify." You understand that?

A Yes, sir.

MR. COOKSEY: Now if the jury [2244] finds you guilty, then just because you didn't testify in the first part doesn't mean that you can not testify in the second part. Okay?

A First and second?

MR. COOKSEY: Yes. You have been sitting here throughout this Voir Dire. You know that.

A This is the first part.

MR. COOKSEY: Yes, this is the first part.

A Oh.

MR COOKSEY: Whether you testify or not in the first part of the trial doesn't have anything to do with whether you testify or not in the second part.

A Okay. Yes, sir.

MR. COOKSEY: See, what I'm saying is the jury is going to go out the first time to either find you guilty or innocent. They vote guilty or not guilty.

A Yes, sir.

MR. COOKSEY: All right?

A Yes, sir.

MR. COOKSEY: If they find you guilty, then we go to the second part of the trial for the jury to assess a punishment of life or death. Okay? You [2245] understand that?

A Yes, sir.

MR. COOKSEY: So what I'm saying is—to you, so you will fully understand, the fact that you don't want to testify in this part doesn't mean you will not get to testify in the second part.

A Yes, sir, I understand that.

MR. COOKSEY: In other words you are going to get to make two decisions as to whether you testify or not if they find you guilty. You make that decision now, and you say you do not want to testify? Is that right?

A Yes, sir.

MR. COOKSEY: Then we'll have to come back in here if they find you guilty, and we'll go through this again because once again you can either testify or not testify in what we call the punishment phase of the trial. You understand that?

A Yes, sir.

THE COURT: Let me just say—I think he understands, but just so that I am absolutely sure that you understand, you have heard the State put on their side of the case. They have rested. They will not offer any more evidence. Okay?

A Yes, sir.

A Yes, sir.

[2246] THE COURT: Now it is your opportunity or your time to put on any evidence that you might want to put on, which would include your right to be sworn as a witness and to tell your side of the case. You understand that?

A Yes, sir.

THE COURT: You will not be given another opportunity to tell the jury your side of the case before they would vote, determine the verdict whether you are guilty or not guilty of capital murder. You understand that?

A Yes, sir.

THE COURT: And as your attorney further told you, that you do not have to testify and I am not by my statement to you telling you to testify, and I'm not telling you not to testify, because I will not do either one and I don't want you to infer by what I'm saying here that I think you ought to do this or not do that. Again, I want you to know all of your options, so that there is no question in your mind that you,

before making the decision to testify or not to testify, that you understand your options; because I am aware that most laymen, they may get a little bit confused as to what is really happening next in the trial, and I don't want you to feel nor does your attorney want you to feel that oh, I thought I didn't want to testify [2247] now but I thought I was going to get an opportunity to tell the jury such and such, my side of the case.

A Yes, sir.

THE COURT: This is that time. This is that time, to tell the jury if you want to, whatever you want to about the facts of this case, to put up your defense, or anything else you want to tell them. You understand that?

A Yes, sir.

THE COURT: Okay, and you understand that if you don't do it now, then I will in a written charge instruct them that they can not and are not to consider or hold the fact that you will not testify against you for any purpose whatsoever, but they will go to the juryroom with the evidence that they have right now. You understand that?

A Yes, sir.

THE COURT: Allright. Now understanding this, are you telling-well, I'm not going to ask anything else. That's not up to me, to ask that question.

MR. COOKSEY: All right. Now understanding full well your rights as to whether you testify or don't testify, and after the Court has explained that right to you, what is your decision, again?

A I don't want—refuse to testify.

MR. COOKSEY: That you refuse to [2248] testify? You want to remain silent?

A Yes. I do.

MR. COOKSEY: All right. Now I'm satisfied, Your Honor, that Delma Banks, Jr. understands full well his rights as far as testifying or not testifying, and it is my client's decision that he not take the stand, that he not testify, and that he remain silent. All right, sir?

THE COURT: All right.

MR. COOKSEY: All right. Now, Delma, you've got another right. You've got your mother and daddy up here, or anybody else up here, that I can require by law to get on that stand and testify. Do you understand that?

A Yes, sir.

MR. COOKSEY: Any of the people that the State called, I can make them come in here and testify. I can make your daddy get on the stand and testify. I can make your mother get on the stand and testify. In other words you've got a right not only for you to testify or not testify; you have got the right to call any of these people and make them testify. You understand that?

A Yes, sir.

MR. COOKSEY: Do you want me to put any of these people on the stand?

A Can I have a word with you?

[2249] MR. COOKSEY: Sure.

(At this time the Judge and the Court Reporter left the Judge's chambers, with Delma Banks, Jr. and his counsel remaining therein privately. After a short time, the Judge and Court Reporter returned to the Judge's Chambers where the following proceedings were had, to-wit:)

THE COURT: Let the record show that this hearing is held in Judge's chambers, outside of the presence and hearing of the jury panel, with the defendant defendant's counsel,

defendant's counsel's investigator, and the Judge and the Court Reporter present.

MR. COOKSEY: Your Honor, my client, Delma Banks, Jr., requested a moment ago that—or it has been some time ago, now, that he have a private conference with me outside the presence of the court, and of course the Court honored that. We appreciate that. We have had ample time, Your Honor, to confer.

THE COURT: All right.

MR. COOKSEY: And I have explained further to my client that not only does he have the right to testify or not to testify, but that he has the right to [2250] call witnesses or not to call witnesses. Now, Delma, you do understand that we can get a subpoena, which is a court order, from Judge Pesek that would make these people get on the stand and testify?

A Yes, sir, I do.

MR. COOKSEY: You understand that we can make anybody that you want to get on that stand and testify.

A Yes, sir.

MR. COOKSEY: Now would you tell the Judge, please, your decision as to whether to call somebody to testify or not to call somebody to testify?

A No, Your Honor, I don't want anyone to testify in my behalf.

MR. COOKSEY: All right, can you think of anyone that you would want to testify?

A No.

MR. COOKSEY: Now, Delma, going further, you do understand that on your first phase, if you do not call anybody to testify and if this jury finds you guilty, that that does not

keep you from calling people in the second phase where the jury will have to assess punishment?

A Yes, sir, I understand that.

MR. COOKSEY: So the fact that [2251] you don't call anybody in this first part of the trail certainly doesn't have any bearing on whether you want to call people or not in the second part, if there is a second part.

A Yes, sir.

MR. COOKSEY: All right. Your Honor, I am of the opinion that Delma is a bright young man. He certainly Delma, you don't have any history of any mental disorders, do you?

A No, sir, I don't.

MR. COOKSEY: Being treated for mental disorders, and you are stating to the Court that you are not mentally sick in any way?

A No, sir, I'm not.

MR. COOKSEY: You don't have a nerve problem of any kind or mental problem, do you?

A No.

MR. COOKSEY: And you have been able to understand all these things that have gone on the last two days, haven't you?

A Yes, sir, I have.

MR. COOKSEY: You have heard the testimony of the witnesses, and you have heard my cross examination of them, haven't you?

A Yes, sir.

MR. COOKSEY: And you have heard [2252] their answers to my cross examination, and you understand all that, don't you?

A Yes, sir.

MR. COOKSEY: Your Honor, it is my opinion that Delma Banks, Jr., fully understands his right: in connection with his testifying or his remaining silent, and also, Your Honor, his right to use judicial compulsions by way of a subpoena to require anybody that he wants to put on the stand to testify in his behalf, and Delma, do I understand that you do not desire to call any witnesses in your behalf?

A Yes, sir, that's correct.

THE COURT: I have only one thing. Is there any question concerning any of this or anything else that you would want to ask me at this time?

A None that I can think of, Your Honor.

THE COURT: Are you telling me that you understand everything that your attorney is saying to you?

A Yes, sir.

THE COURT: Okay. I am of the opinion that the defendant fully understands his rights, and if he does have any question whether he—and this question that I'm talking to you about is whether s material or not, if you will ask it, I will tell you whether it is or not [2253] or whether it pertains to it, so if you've got any question, if you ask me, I'll see that you get an answer. You understand?

A Yes, sir.

THE COURT: Okay. I am of the opinion that this defendant fully understands his rights and if he wishes to exercise his Constitutional right to remain silent, I think that he has a perfect right to do so, and he says that that is what he wants to do, and I think that that should be honored. And I think that he fully understands that he can call witnesses. If he has no witnesses to call or does not want to call any witnesses, that will be respected.

MR. COOKSEY: All right, sir, and I'm certainly of the opinion that he is intelligently and knowingly making these decisions.

THE COURT: All throughout this not only the last two days but last week in the selection and Voir Dire, in which we had other motions during and prior thereto, he participated in them; and I, too, am of the opinion that he is a bright young man, and able to understand the decision-making, and I think that counsel has more than adequately aprised him of his rights in the matter.

MR. COOKSEY: Delma, just one other thing. Can you think of anything else that you want me [2254] to do on your behalf before we submit this to the jury?

A No, sir.

MR COOKSEY: Are you satisfied with my representation of you to this point?

A Sure am.

MR. COOKSEY: Okay, and do you have any complaints to make to the Court at all at this time about my representation of you?

A Oh, no, sir. I don't.

THE COURT: Now, Delma, let me say this to you, and as I told you before, I want you to—I think it is very important that regardless of what may—the decision the jury may make in this case, that as far as the relationship that you have with your lawyer, that he has done what you wanted him to do, and that you are perfectly satisfied with his representation. Now if you are not satisfied with any part of his representation, I want you to make that known to me at this time. Are you fully satisfied with Mr. Cooksey's representation?

A Yes, sir, I am.

THE COURT: Has he conferred with you every time that you wanted him to confer with you—talk with you?

A Yes, sir.

THE COURT: Has he gone over the [2255] law with you?

A Yes, sir.

THE COURT: Has he gone over the facts of the case with you, as he sees them?

A Yes, sir.

THE COURT: Has he gone and told you what his opinion was concerning what people might testify or not testify to?

A Yes, sir, he has.

THE COURT: Is these anything that your lawyer has or you have asked your lawyer to do that he has not done, that he was capable of doing?

A No, sir, none I can thing of.

THE COURT: Have you talked with your parents, your mother and your daddy, about this case—and you have talked to them, I'm sure, have you not?

A Yes, sir.

THE COURT: Have you told your parents or explained to your parents that you are satisfied with Mr. Cooksey's representation of you?

A Yes, sir.

THE COURT: I can not talk to your parents, but I would ask you whether they have told you that they are or are not satisfied with Mr. Cooksey's representation of you?

[2256] A They are, sir.

THE COURT: They are satisfied? They told you that they were?

A Yes, sir.

THE COURT: And you told them that you were?

A Yes, sir.

THE COURT: You see, Delma, you may understand or may not understand why we are asking you these questions, and seems like we're going over and over the same old thing, but there is an important reason for it. Your lawyer is charged with the responsibility when he took this case to defend you to the best of his ability, number one. To defend you in the way that you wanted him to defend you. I, as Judge, as you know, I'm not taking any sides in this case. I'm not taking the side of the State and I'm not taking your side; but what I want to see and what I'm-working toward is to see that you get as fair a trial as the law could possibly give you. You are entitled to that, as a defendant in this state.

A Yes, sir.

THE COURT: Now a lot of these questions go to the question of getting a fair trial, and I want to be sure in my own satisfaction and also to your satisfaction that you have gotten a fair trial, and that's why we [2257] are asking these questions because if there is something there that I don't know about, I can't talk to you unless your lawyer is here, nor do I want to talk to you, because this is the way the system works. So while I have this opportunity to talk with you, if there is something out there that you feel that the Court should know, now is the time to tell me, and that's why we go back over these questions that I want you to know that you have the right to bring it up at this time or at the other times that we might have conversed, here. So again, I'll you and then I'm going to quit. Do you have any questions about anything?

DELMA BANKS: Not that I can think of.

THE COURT: Okay. All right.

MR. COOKSEY: I want to say this, Delma. I have tried lots of criminal cases, literally hundreds. I have never been treated more fair by any judge anywhere than I have in this trial, and I think the Judge has been very professional. I think that the Judge has assisted you, so that you do understand your rights, and I have just never been treated any more fair. Do you agree with that?

DELMA BANKS: Yes, sir.

MR. COOKSEY: And I sincerely appreciate it, Your Honor.

* * * *

[2264] The burden of proof is, as we told you in the beginning, upon the State. Our burden is to prove the guilt of the defendant beyond reasonable doubt. Not beyond all doubt, and not beyond a shadow of a doubt, but beyond reasonable doubt: beyond any doubt for which you might have a reason. You promised us that you would not hold us to a higher burden. Ladies and gentlemen, I believed you then and I believe you now.

The Court in its charge reiterates your oath about law and evidence and it says you will not consider or discuss anything not represented by evidence. Now perhaps you became confused someplace along the line, but let me reassure you that evidence was the answers and the testimony that came from that witness stand. It was not the question asked by the lawyer. No guesswork, no speculation. The exhibits and the testimony, that's the evidence.

You were also instructed with regard to circumstancial evidence and with regard to the law as it pertains to admissions against interest. Ladies and gentlemen, I want to come back to that with you; if you would, file that away and remember that we will touch upon this again. I would respectfully submit to you that based on the law in this

particular case, based on the evidence that you heard, you need go no further than that page right there (indicating). The one that says simply a person commits the offense of [2265] capital murder if the person intentionally and knowingly causes the death of an individual and the person intentionally commits the murder in the course of committing robbery; and a person acts intentionally or with intent with respect to the nature of his conduct or to the result of his conduct when it is the conscious objective or desire to engage in conduct or cause the result. That has a direct bearing about questions that you were asked on Voir Dire. We told you the State at no time placed upon us the burden to prove premeditation, and you didn't hear the word "premeditation" in that charge. We do not have to prove to you that this crime was planned a month, a week, or five minutes ahead of time. Only that when the crime was committed, it was intended to be done; that, and that alone, is our burden. Nor did you hear anything in the Court's charge about motive, and we told you that on Voir Dire. We don't have to prove motive because only the person who acts knows why. The evidence of the offense that you heard here would have revolted any thinking, feeling, human being with an ounce of sensitivity. To try to figure out why Richard Whitehead, a sixteen year old boy, wound up with three bullets in him, shot between the eyes, shot in the back, shot in the back of the head, is beyond this jury. It is beyond the ability of any good, decent human being. That's why you don't have to try to figure out a motive.

[2266] Ladies and gentlemen, to get to the crux of the issue, on your verdict form you need go no further than the first line on the back of the page, the one which says, "We, the jury, find the defendant, Delma Banks, guilty of capital murder." I would submit to you that based upon the evidence that you have seen produced here, that is the only just conclusion that you can reach.

With regard to the evidence produced here, let's review it simply, step by step. There was a time when I was so bewildered in the first day of this trial, felt like throwing up my hands, "Oh, Lord, my God, is there no help? Will we ever reach an end to this?" But let's stop and let's think about what we've got.

Patricia Hicks, the girl who was with Richard on his last day of his life, what does she tell us? That they picked up a black male that she identified as Delma Banks. There is no doubt. If there is one thing in this case about which there is absolutely no doubt, it is the identity of Delma Banks. He has been identified to the point that his hide could be recognized in a tannery. Every person that took that stand pointed at him. Maybe they didn't call him Delma Banks, maybe they called him Red, but they sure pointed to the defendant in this case. Let's think about what Patricia has to say. They are riding around, a sixteen year old boy, pick up Delma Banks. Whose idea is it [2267] to go buy beer? It's Delma Banks' idea. Who pays for the beer? Who purchases the beer? Delma Banks does. Whose idea is it to have a beer drinking contest? Why, it's Delma Banks' idea. What kind of contest? A chug-a-lug, where you try to drink beer real fast. And isn't it strange that Delma Banks, a grown man, always loses? Don't you get a feeling for something coming here? Don't you get a feeling that this young man is somehow being manipulated, that this sixteen year old boy wasn't quite prepared for what he met that night? Certainly wasn't prepared for his death. No man ever is. But to be slaughtered in that fashion, don't you get a little bit of a feeling about what's coming?

They take her home. She's not the only person that sees him that night. Patty Bungardt sees Delma Banks and Richard Whitehead; sees them late at night, around 11:00 or 11:30. That's crucial, ladies and gentlemen, because that places Delma Banks with the deceased in this particular case late at night in Nash, Texas, in that park out there where Delma led

them. Delma knew where the park was. He had a good idea: you pulled to the back of the park and you backed up so nobody could see you. He had been there.

Mike Fisher, early that morning, hears shots. I know he said he heard two shots; we have got three bullet holes. Ladies and gentlemen, a reasonable deduction that you may draw from that evidence is that the first shot was [2268] the one that woke him up, and the second two shots were the ones that he was aware of hearing. But a pistol, especially a .25 caliber automatic fired in the deep, dark woods, the report, the echo, the sound of that-easily muffled. Easily distorted. The important thing is that he heard shots.

Mr. Whitehead describes to us the car, the automobile, and I'll tell you what else he did for us, too. He did something that we absolutely had to do. We had to prove up the identity of that body. We had to prove that it was Richard Wayne Whitehead that was killed. Bear with me.

This is State's Exhibit Number One (indicating). We couldn't show it to you when Richard's father was testifying, but you know the picture he looked at to identify his son? That is it (indicating). That's the last way he'll remember his son. That massacred boy, that's a fine thing to have as the last lasting impression upon your mind. Didn't have to happen. Didn't have to be that way. Delma did it. Delma arranged that. Delma was responsible for Mr. Whitehead seeing this picture of his son.

Among other things Mr. Whitehead assures us that his son did not have to work. That his son was a hard-working boy, that he held down two jobs, that he was interested in bowling, that he came home fairly early. He was home by 10:30, seldom stayed out late. Now I admit we have Richard in a park, drinking beer. So what? We have a sixteen year [2269] old struggling with his adolescence. Just because a boy touches alcohol does not mean that he deserves to be

slaughtered. It doesn't mean that his life is worthless. You've got a prank or a stunt, and certainly nothing to justify murder.

The body is found and Willie Huff begins his investigation; and I want to tell you, folks, I'm proud of what Deputy Willie Huff found, and let's look at it. To begin with, he brings us the truth and like I said, this is a search for truth. This is what Deputy Huff found out there. This is what remains of Richard Wayne Whitehead after Delma Banks has had his way with him. This is it (indicating). This is what Willie Huff found out there in that park. This is what he told you about.

That was the scene that Deputy Huff recovered for us and preserved for us, so that we might know the true nature of what happened, but you know what he did? He went a step further and he solved for us one of the questions we have to answer, and that is was Richard Wayne Whitehead intentionally killed? You better believe he was, because you do not accidentally shoot someone between the eyes. You aim at them, folks. You execute them when you shoot them between the eyes.

Let's look at what else he found out there. He found shell casings fired from a .25 caliber automatic, and [2270] he found a spent projectile. Okay? He preserved those, but we didn't know the truth about those until later. We didn't know what these meant until we could get them to our experts and you know, our experts, by the way, are the ones that constitute the overwhelming advantage that the State has. Aren't we glad that we've got experts to help us find the truth about these matters? Aren't we thankful that we have the resources so that we can afford to bring something like this to light and find out the truth about it? If that's an overwhelming against a poor citizen of Bowie County, the ladies and gentlemen, let me remind you that Richard Wayne Whitehead was a citizen of Bowie County. He was a citizen. He had rights. He had privileges.

Defense has no questions of Willie Huff. They didn't want any part of him, because he came loaded. He had the truth. Ladies and gentlemen, in order to bring you the total story, in order to bring you the whole truth, we call as our witness Marcus Jefferson. Now I'm going to be very honest. The people that we had on before you and the testimony that we produced was not that of a Baptist preacher and ten Deacons, but that's not because we wanted it that way. Delma Banks chose his friends. Delma Banks chose his in-laws. These are people of Delma's choosing, not us.

The people that you saw come before you today and the day before were thoroughly tested and I ask you to search [2271] your memories and recall the testimony and see if you can discern any reason why these people would falsify for vengence or for advantage or to save their hides. I didn't see any.

What does Marcus Jefferson tell us? Basically the same thing that Robert Farr tells us; that they got in a car and that they went to Dallas, Texas, with Delma Banks. And, ladies and gentlemen, this is absolutely devastating when you think about the implications, and here is why. That's Delma's gun, folks. Now when Delma got in the car to go to Dallas, only Delma knew that was over there. Delma led the police to that residence and when Delma went up to Charles Cook's door and knocked in the night and then walked away, what did he tell you? He spoke to you through Robert Farr and Marcus Jefferson. You know what he said? He said, "They don't have my gun." This is my gun. This is Delma's. This is Delma's gun. Charles Cook didn't want any part of it. He said, "Man, I don't have your gun. I gave it away." Delma's gun. Delma knew it was there. You remember that when you try to piece this together, that when he went to Dallas, he went over there to get his gun: he went to get this, this filthy looking little piece of killing instrument belonged to him and nobody else, and all the soap and all the water in Bowie County can not

wash that fact out of this case. That is a reasonable deduction. Any [2272] other type of conclusion as to that weapon is unreasonable. If Delma didn't know that gun was over in Dallas, why did he drive over to get it? If Delma didn't think that that was his gun, then why when he came back to the car did he say, "They gave away my gun?"

Charles Cook told you who that gun belonged to. Charles Cook gave it to Benny Jones; and at the direction of the police officers, Benny gave it back to Charles and Charles gave it to the cops. That gun finally made its way back. It traveled, it killed, it went and hid in Dallas, Texas, it traveled, but it finally comes home because murder and truth will always out, folks. They might stay hid for a while, but eventually if good people work long enough and hard enough, the truth is going to come out, and it did.

I'll be very honest. I don't know if any testimony at all can be enjoyable in a proceeding like this, but I rather enjoyed Robert Farr's, because Robert was pounded on. You got tracks, don't you, Robert? You use drugs, don't you, Robert? And Robert came right back with the last thing in the world that the attorney asking him the questions expected, and that was the truth. He says, "Yeah, I use drugs." But you know what, folks? That doesn't have one single thing to do with the issue of who did that. That's a rabbit trail, and I'm not going to chase down rabbit trails, avoiding the ultimate issue of this case, [2273] and I'm not going to lead you down there, either. Regardless of what you hear, we're always going to come back to the truth and we're always going to put ourselves to resolving the ultimate issue in this case, and that is who killed Richard Wayne Whitehead? And having focused on Delma Banks, did Delma Banks kill Richard Wayne Whitehead? Did we prove it beyond a reasonable doubt? That's it; not drugs, not criminal record, not camouflage, smokescreen or wagon-loads of baloney meant to distract you but simple, straight-forward facts.

Now Charles Cook didn't hide anything from you, either. He came right up with it. Have you been convicted? Twice. Did you go on trial? No. I pled guilty. Why? Because I was guilty. He didn't hide a thing from you. Now if we had been picking witnesses for this case, we would have done a better job, but life is as we find it. We take our witnesses and we take the proof as it is given to us, as we find it and as we search for it. That's the truth about this matter. Charles Cook brought you absolute truth. Now perhaps he doesn't remember every single detail. Perhaps he did not satisfy Mr. Cooksey, but don't you know that he is not a professional witness? Didn't he tell you that he had never testified before? He's only human. I challenge any one of you to try to sit down and reconstruct any weekend in your life and recall every single detail about it.

[2274] And then Charles Cook was jumped on. You mean a man confessed a murder to you and you didn't call the police? That's hard to understand for us, but we're not black folks living in South Dallas. Our lives are different. Why is not important. Charles Cook is not President of the Chamber of Commerce. Charles Cook is a man who has been hit with life; he has made mistakes. He came down here and told you about them, and here is an important thing, too. Charles Cook gave the murder weapon to the police, and Mr. Cooksey made a big to-do about that. Who did you get this from, Benny Jones. Charles Cook. Who did you give it back to? Charles Cook. You didn't get it from Delma, did you? No.

Stop and think about this, ladies and gentlemen. Charles Cook was the only one who knew where that pistol was and when the police came looking for it all he had to say was I don't know. If he wanted to dodge and duck and get out of something, if he had something to hide, he could have just said, "I don't know where the pistol is," and the investigation would have stopped right there, but Charles Cook didn't do that. Charles Cook was scared. Charles Cook didn't want any

more trouble. He has already had his share, so he led the police to the murder weapon.

Mr. Cook was asked why didn't he call the police after he had heard a murder confessed. Put yourself in that man's position. Put yourself in the position of anyone who [2275] abruptly receives a confession of murder. What do you do? Now s real nice to sit up here in this clean, antiseptic courtroom and wear coats and ties and figure out what should have been done and what would look nice. But if you're Charles Cook, in the upstairs of your grandparents' bedroom and you're fighting for your life, you're making two hundred dollars a week and you don't have a good past and you've got no hope for the future, then the answer is not so easy. Then you realize that not many people want to believe Charles Cook. Mr. Cooksey certainly didn't want to.

He dumped the Mustang. He sold the pistol. He tried to make a few bucks, and we don't deny that. We didn't hide it. We brought it out. That was not brought out on cross examination. You know what Charles Cook says? He says Delma was going to turn himself in after Delma called his mother.

Do you realize what the value of this telephone record is? Because the number on there, ladies and gentlemen, is Charles Cook's number, and there's a 'phone call made from Dallas, Texas, to the residence of Delma Banks here in Texarkana, just like Charles Cook said there was. This is consistent with what we know to be true, and Charles Cook told you that. He didn't hide and he didn't back up, and it got tough for him and he looked nervous and he bit his lips and he licked his lips. That's a pretty hot seat up here, [2276] folks. You sat there when you were being Voir Dired, and some of you found yourselves in a little bit of an uncomfortable position as you struggled to coming to the truth within yourselves. Mr. Cooksey pointed his finger at him in numerous ways, but Charles Cook didn't budge from the truth, and that's ample evidence that Charles Cook is telling

the truth. That doesn't lie. Mrs. Hamby doesn't have any reason to lie.

Ida Marie Cook. She got jumped on, too. You use drugs, you're strung out on drugs, you get drugs for your husband, don't you? Isn't it odd that when we talked about drugs and when we talked about criminal records, somehow we didn't want to talk about Richard Wayne Whitehead getting killed, did we? That wasn't a fit subject for conversation because that's too close to the truth. We didn't want to hear about that from Ida Marie Cook, did we? Cross examination never touched on it; left a lot of questions hanging up in the air. Bear in mind questions are not evidence. You may not consider them if you want to uphold your oath as a juror.

Bennie Lee Jones. He comes in and confirms exactly what Charles Cook said. Yeah, he sold me the gun. Yeah, I gave him the gun back. Yeah, that's the gun. Charles Cook didn't hide anything from you. We didn't hide anything with regard to any of these witnesses. We presented them to you [2277] as they were.

Mr. Whiteurs. If you doubt where Charles Cook spent the night the same night this young man had his life taken from him, look at Mr. Whiteurs. Is that a professional liar? Is that a professional witness? Is that a man scheming to save his own? That man can't come to you any other way. If we put him up here three hundred and sixty-five times a year, he would be the same because that's all he can be. He told you the truth. He put Charles in bed that night, 11:00 o'clock. He got him up that morning at 6:00. Is there any doubt where Charles Cook spent that night? None.

Do you remember Carol? Carol remembers that weekend. She remembers the week-end Red was up there, and she remembers it very well because both her and her sister had just given birth to children. That makes that week-end stand out. It doesn't just blend in.

We had our medical expert come up here and testify. Bear in mind what he said. Powder tatoo marks in the forehead. What did he tell us, that meant? That that muzzle was approximately a foot and a half to two feet away from that boy's face when it was fired. You can see the black marks in the picture, folks. You can see the powder tatoo in the boy's face. That is physical evidence that does not lie. That is physical evidence that will stand up under any [2278] scrutiny, under any cross examination. Doctor DiMaio told you what caused the death of Richard Wayne Whitehead. Gunshot wound. Doctor DiMaio also told you something else that sheds light on this case, and that is that he examined the hands. Do you remember when I asked him the question, did you examine the hands, did you examine the face? And he found a crusting abrasion on one of the fingers. That doesn't occur after death. There was not sign of a fight. There was no sign of a struggle. There was not one wound on the boy's face or hands.

I tell you, folks, it may sound rather strange to say that murder is a serious crime, but a lot of times we use words without thinking about their full impact. We gloss over them, we skim over them, but murder is serious, but we never quite stop and wonder in depth about why. It's such a taboo, you know, we don't do it. We know we hold murder to be the most serious crime, but let's stop and think about why, and that is because murder takes away the most precious thing on earth, and that is a life. It is absolutely irreplaceable once it is gone. You can't put it back. You can't undo the harm and the grief that is left behind.

Richard Wayne Whitehead: sixteen year old boy. He'll never see the trees, the spring. He'll never see our rain. He won't feel the warm sunshine on his cheeks. He'll never walk into that house again and say, "Hi, Mom, I'm home." [2279] That's why it's serious. When you saw Mr. Whitehead up here look at the picture of that son, that's why it's serious. We

don't have to tolerate this in our society. We need not put up with murder. We do not have to do this, ladies and gentlemen. You have been given the evidence that will allow you to return a verdict of guilty, and let's talk about the particular type of evidence that we've got.

It is circumstancial evidence, but like we told you in the beginning, it does not raise our overall burden of proof one little inch. It doesn't require us to take down every absolute possibility under the sun, in infinity, that is absolutely imaginable. All that we are required to do is prove our case beyond a reasonable doubt. To a reasonable and moral certainty. I submit to you that all that means is that you are to be as sure about this part of the case as you are any other. That's all that means. It doesn't set up an impossible standard, and it says that must exclude to a moral certainty every other reasonable hypothesis and I would suggest to you that the operative word is "reasonable." What is reasonable, not what might have happened. Not that the Martians came down and did this, but what is reasonable? What is consistent with the facts? What is consistent with the evidence that you heard?

I think this next paragraph is a little bit illustrative of that. It says that you are not to rely on an [2280] admission against interest standing alone for a conviction. An admission against interest is referring to when Delma Banks told Charles Cook, "I thought about killing the kid for the hell of it." That's what Richard Wayne Whitehead's life was reduced to in that moment. For the hell of it. And when is the next time to see Delma Banks? He's sitting in Dallas, Texas, in that car. In Richard's car.

Now let me tell you what circumstantial evidence is not. Let's say you got a car and you send your spouse to the grocery store for some groceries, and she goes to the grocery store and she gets groceries and she comes back and she cooks and y'all eat and go to bed, and you get up the next

morning and there's a dent in your car, and you come back inside and you say, "Why didn't you tell me you wrecked the car?" That is not what we're talking about here. Any intelligent, decent citizen of this county knows that that will not hold water in a court of law one split second, and that's not what we're talking about.

Let's look at some of the facts and circumstances in this particular case.

THE COURT: You have four minutes.

MR. ELLIOTT: Thank you, Your Honor. The gun. The gun that belonged to Delma. The gun that Delma went to get. The gun that only Delma knew was there. The gun that he didn't get at Charles Cook's, but [2281] when he came back out and sat down in the car, "They don't have my gun. " That admission to Charles Cook, "Yeah, I shot the white kid for the hell of it, shot him three times," you don't say things like that if you don't mean them, folks. That's why they are admissible into evidence as prove against one accused of crime, because reasonable people do not go around admitting to murder unless they did it.

The grandfather. Did Mr. Whiteurs—you know, he kind of helps us fill up this little gap of circumstancial evidence, here. You know, he told the truth. He identified Red-Delma. You ask what a reasonable person does in those circumstances. You look at reasonable from the point of Charles Cook, and it differs a little bit from what you and I imagine to be reasonable. These are not simply facts that point a suspicious finger. These are not simply empty, mindless allegations. Perhaps in figuring out any other reasonable hypothesis, we could come to one other conclusion about how this might have happened, and the only other reasonable conclusion is this, that everybody that you have seen in this courtroom has conspired and banded together to frame Delma Banks. Marcus Jefferson wants to frame Delma, Robert Farr wants to

frame Delma, Charles Cook wants to frame Delma, the police want to frame Delma, the balistics experts want to frame Delma, the medical examiner wants to frame Delma, our lady from the telephone company wants to frame Delma. [2282] It does not make sense, ladies and gentlemen. All in God's world we are asking you to do is come to a reasonable conclusion based on the evidence, and there is but one reasonable conclusion and that is that Delma Banks, as he sits right there, is guilty beyond reasonable doubt of committing capital murder. We told you that was what we were driving at in the beginning, and that's where we are now and the evidence, ladies and gentlemen, is irrefutable. We piled it up a block at a time, a stone at a time, and it turns into not just a reasonable pile of evidence that sort of points to Delma. It is a mountain that shouts his guilt. I will have the privilege of addressing you again. Right now, thank you for your attention.

THE COURT: Mr. Cooksey?

MR. COOKSEY: May it please the Court.

THE COURT: Mr. Cooksey.

MR. COOKSEY: Mr. Elliott.

MR. ELLIOTT: Mr. Cooksey.

MR. COOKSEY: How much time did you allocate us?

THE COURT: Forty-five.

MR. COOKSEY: All right, sir, I'll give some back. Ladies and gentlemen, thank you very, very much. You have been very attentive. You have listened [2283] to the evidence. Some of you have been actually conscripted now for ten days. That's a tremendous sacrifice on the part of our citizens of this county, performing the jury service as you have performed. Number two: my heart goes out to Mr. and Mrs. Whitehead. I, too, have lost a child. There is nothing more painful, nothing more hurting that can happen to a person.

Ladies and gentlemen of this jury, I think probably from my individual Voir Dire that as the Judge has read you the charge, that is the law the Judge has now submitted to you and in just a short while will give to you to take to the jury room. The Judge has defined the law and the evidence and told you how to apply the evidence to this case. I want to go over some of the Court's charge with you very briefly. I know that you good folks are tired, I'm tired, we have been at this a long time, but I want to go over some things with you and see if we can touch some points that I feel are important. Number one, as I told you when I was selecting you on Voir Dire, you are the sole judges of the credibility of the witnesses. You are to—why did they testify this way, did they tell the truth, are they trustworthy people, would they honor an oath if they were given one?

The Court has said that as soon as you retire to the juryroom, you will select one of your members as Foreman. That Foreman is to preside in an orderly fashion, just as [2284] the Court says, for you to deliberate and talk about what you have seen and what you have heard. If you desire to communicate with the Court, there is a buzzer up there that the bailiff will show you, and Mr. or Mrs. Foreman, the communication must be in writing to the Court and you hand it to the bailiff. The bailiff will respond to the buzzer and bring the note to the Court.

Judge Pesek has told you this case depends upon circumstantial evidence. The Judge says that in order to warrant a conviction, each fact necessary to the conclusion sought to be established must be proved by competant evidence beyond a reasonable doubt. It must be consistent with each other, these facts, and they must be of a conclusive nature. On the whole, they have to produce a reasonable and moral certainty that the accused and no one else committed this offense. The Judge says, ladies and gentlemen of the jury, it is not sufficient that the circumstances coincide with,

account for, and render probable that Delma Banks did what he is accused of doing. The Judge says the State's burden is to exclude to a moral certainty every other reasonable hypothesis.

Ladies and gentlemen, whoever the Foreman is, I want you to read what Judge Pesek has told you the State's burden is in this case. It's going to be up to you then to determine whether the State has met that burden or whether [2285] they have not. Now the judge says on an admission against interest, the Judge qualifies that. He says with an alleged admission, and then the Judge says, "if any." If any. All right? You look at the judge's charge. The Judge says an alleged admission, if any. Then the Judge by law, as I explained to you, most of you, on the Voir Dire, submits to your capital murder, murder, aggravated assault. That's what these pleadings have raised. You can go through that and there is nothing uncommonly difficult about it. It is very basic and very simple, as to what the Court has told you that it is.

Let me talk to you a little bit about capital murder and murder and aggravated assault. Judge Pesek tells you that a person commits the offense of capital murder if that person intentionally causes the death of an individual and the person intentionally commits that murder in the course of committing a robbery. You have to come up with evidence beyond a reasonable doubt that Delma Banks, while he is committing a robbery, killed somebody. Think real hard and see where that evidence is. There is none. There is no proof that Delma Banks was in the course of commiting a robbery and killed someone. Not one scintilla. Not one ounce of proof is there for this, ladies and gentlemen. Not one. All we have heard and all the State says, he shot this man and stole his car. That's not what the Judge tells you capital murder is. He says to you, ladies and gentlemen of this jury, the State has got to prove to you that Delma Banks, Jr., is in the course of committing a robbery and then he takes a life. The Judge says

if that is not there, then you folks consider murder. Murder is the intentional taking of another person's life.

Now what evidence has the State brought to you on that? The only evidence that they have brought to you is that Delma was at the bowling alley and he goes with the decedent; they are together, and they drink a little beer. He loses him for over four hours. Mike Fisher says he didn't hear that gun report until 4:00 o'clock in the morning. Did they show by the autopsy report that the decedent had a higher level of alcohol? It certainly wasn't proven to you, but you might assume that these two fellows were out riding around, drinking beer. Well, what is the level of alcohol, and then I asked the doctor, "What does that indicate to you?" Well, drank about maybe one and a half beers. You see? They couldn't put it together.

I'll tell you, Delma Banks is guilty of one thing and that's not selecting very good friends. Initially Mr. Elliott tells you Delma's going to manipulate somebody? Who is manipulating? Who is manipulating? Folks, I served over ten years in the District Attorney's office. . .

* * * *

[2286] MR. COOKSEY: Notice I did not make one objection while Mr. Elliott was addressing you. Ladies and gentlemen, this in my opinion is one of the poorest investigated cases I have ever seen. I asked the investigator, Officer Huff, did you know Robert Farr was a doper? "No, sir, I didn't know that. Not to my personal knowledge. I didn't know that." My investigator, Dennis Waters, told me that. I asked him.

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[2287] MR. COOKSEY: You folks knew I couldn't see tracks on his arms from all the way back there, but I said, "You're tracking, aren't you?" "Yes, sir." Talked to him in street language. "You're holding?" "No, sir." He knows the

drug language. He knows the street talk. I ask you, someone like that, is that a credible witness?

Nobody brought us any fingerprints or even the fact that they ever dusted that gun to bring you some fingerprints. If this case had been properly investigated, all of that would have been brought to you, and then the State wouldn't be up here asking for the death penalty on murder. . .

* * * *

[2288] MR. COOKSEY: Asking you to convict a man of capital murder on the word of Charles Two-two Cook. The court says that after you have considered the murder charge, then if the evidence is not there beyond a reasonable doubt to a moral certainty and excluding every other reasonable hypothesis, then you will consider aggravated assault. If that's not there, ladies and gentlemen, it's a verdict of not guilty.

I want to go over some of the evidence, and I want you to see—I think you see what is here. Mike Fisher certainly told you the truth, without a doubt. Patricia [2289] told the truth, without a doubt. And I'll tell you somebody else. The man that Two-two sold the gun to. He wasn't rehearsed. You could look at the witnesses and tell when they have been rehearsed. Even though Two-two says I've never talked to anybody in my life about this case, you know that's not the truth. You know that is not true, because I stood up and I said, "Your Honor, under the rules of law I'm entitled to see the statement that he gave them." He had it. The District Attorney's office produced a statement. That's the way his testimony started off.

Let me tell you another thing, ladies and gentlemen. As I told most of you, it's the lawyer's job to assist the jury in showing some of these witnesses not telling the truth. That's the lawyer's job. All these old pros, you can lean on them, you can do everything you want to do; you're not going to

rattle them. They've got their story down, and they're sticking to it. Let me tell you something. A person can get on that witness chair. You people are sitting here in this jurybox and we had to go back in chambers for some reason or the other; I walked out and Two-two has got his head laying down like that (indicating). He can't look at you jurors. Any time somebody is not facing you, he's holding his head down, that's what it is when the Judge tells you that you can look at the demeanor of a witness. You look at that witness. You see them.

[2290] Let me just ask you this, ladies and gentlemen. Is it a coincidence that Cook is married to a girl from Texarkana? Is it a coincidence that Cook, his wife, and Robert Farr all shoot Preludin? Is it? That puzzle doesn't fit, does it? Is it a coincidence that Officer Huff follows them to Dallas because he has been told that they are going to Dallas in Farr's car, and they go, and they are followed. And they go where? To Two-two's house. Two-two's house. You know, let me tell you what's unreasonable about cars. Dopers have to travel in different cars because the officers get wise to them, who they are, like these folks with known records, and these officers get them a search warrant to run on that doper's car. Now if the search warrant describes the wrong car, the officer has made a bad bust and you can't use that as evidence against him.

Now they've got to change cars and got to change cars, and they've got to change cars frequently. If you run that search warrant out there on a 1976 Chevrolet, and they're in a 1976 Ford or a Mustang, there ain't nothing you can do with them. Folks, did you see Charles Cook's wife when I first started talking to her? First question I asked her, she said, "I don't know what you mean." I said, "Aw, Mrs. Cook." She warmed up, then. She knew I knew that she knew the street language, because she had been convicted on a drug charge. I ask you, does it ring of truth that [2291] Delma Banks would go and tell Two-two this, and Two-two then would continue driving

that car around Dallas? You don't have to leave your common sense in the jurybox. You know why Two-two was running around in that Mustang. You know.

Mr. Elliott says a person—you know, does it ring of truth that Delma drives up there and never seen these folks before, just coincidentally there is a woman there from Texarkana, and Delma goes in with a man he has never seen, hasn't known in his whole life and says, "I killed somebody?" Let me tell you when Two-two almost wanted to tell us the truth. He said, "I went down and I took the gun, and I told Delma, you understand." Baloney. He's going to take the gun because he doesn't want to get in trouble, and yet he's the one driving the hot car around town.

Ladies and gentlemen, you know what we've got, here. Because some terrible thing happened to this sixteen year old child, we want to convict a person that is guilty. What about Two-two? What kind of man is he? Firebombed his own sister's house and he is charged with arson, would kill his own sister.

[2292] MR. COOKSEY: Then he's going to get on the stand and he's going to swear to the truth for you folks, and you good people are supposed to take everything he says lock, stock, and barrel? Mr. Elliott says well, you know, he voluntarily told you all this. He sure did when the police got their hands on him. Then he says, "I'm the one that disposed of the car. I'm the one that disposed of the pistol. I'm the one that sold the battery cables. I'm the one that sold the toolbox." Yet Delma did it. Does that add up to a solid guilty for Delma Banks?

I know, ladies and gentlemen, common sense tells me that all of us want to find somebody guilty for this crime. We do. Certainly. But what really—what really do you have except the fact that Delma was over at the bowling alley and left in

the car with him. What do you have besides that? Except the word of Two-two? The word of Two-two should raise a reasonable doubt in anybody's mind. You know what they've got? They've got that old indictment wrapped around his neck up there in Dallas. He'll tell you anything; he don't want to take no murder rap. Boy, he don't want to take no jury on a capital murder charge with his prior record.

Ladies and gentlemen, I truly hope that you are never unfortunate enough to have to tolerate dopers. I hope [2293] that is a grisly part of our society, grotesque, that you never see. I have seen it.

Ladies and gentlemen, when you and your wife together make two hundred dollars a week, a little over, and that won't even feed your drug habit, you've got to get you some money from somewhere. That's not even that hasn't even started paying the rent and buying groceries and all these other things that you and I work so hard to pay. It takes more income than you bring in for your drug habit. How reliable are those folks, let alone when both husband and wife are takers?

Benny Lee Jones—I couldn't think of his name a while ago. Benny Lee Jones said, "I bought the gun from Two-two and I bought those cables and I bought a toolbox." You know, I feel certain that Mr. Whiteurs thought he was telling you the truth, but Two-two told us he didn't work on Saturday. Worked for the City. And Mr. Whiteurs said "I remember he was there because I had to go up and get him up Saturday morning so he could go to work. I would do anything to help my child or my grandchild." I'm sure Mr. Whiteurs wanted to do that, and was convinced he was telling the truth, but why he didn't know about Charles Cook's trouble is beyond me. He lived there at the house, and he has been in jail since May.

Ladies and gentlemen, the State has told you all [2294] along that they would be able to prove to you capital murder.

I submit to you that they have not. I submit to you that you're on the fringe of a drug cult. I submit to you that these folks that got up here all were convicted. Marcus Jefferson: convicted burgler. Two-two: convicted robber, convicted thief, admitted doper, charged this very moment with arson. Mr. Elliott would have you believe that you don't consider how reliable a man is when he gets up here on the stand. Why, don't you know-don't you know that if Delma Banks had gone up there and said, "Two-two, I killed a man. That's his car, here is the gun I did it with." With his record, if he is trying to go straight, would he go sell that gun? Would he go sell the stuff out of the car? Would he go hide the car? No. He ain't trying to go straight, and he's not trying to be honest with you people. You are the sole judges of the credibility of the witnesses. Credible? Credible? No.

The State, as Mr. Raffaelli told you in his opening statement, the testimony of Two-two is vital. It's vital. It's very important. I guess it was. Only thing they've got is Two-two, uncorroberated statement. That's all they've got. That car needed to be recovered so that that thing could have been dusted and printed, but it hasn't been. Tell me where the evidence is that Delma has ever been in that car in his whole life? Two-two. Two-two. [2295] And brother, Two-two has been there and back. He has been around the block, and he has dealt with cops all of his life and he knows what he needs to do to protect Two-two.

Ladies and gentlemen, as you can very well see, in my examination of these dopers I have a very strong personal dislike. I told each of you that I hope that I wouldn't offend you, and I hope that I didn't when I came down on some of them, but I know what I'm dealing with and I think you people do, too.

Mr. Elliott says throughout this trial on many occasions I wanted to stop and throw up my hands. He sure did. He knew that they were not proving their case. He knew and he banged

the table. And when a lawyer gets that frustrated, he knows he is not meeting his burden.

The only thing, ladies and gentlemen, that the State has brought you is a telephone call from Two-two's residence to Delma's residence on Saturday. Wouldn't it be just as reasonable and just as likely that Two-two called Delma on that telephone? The State hasn't met their burden. They want you to assume that that was Delma calling home. You see? They had Delma's mother and daddy under subpoena. Why didn't they put Mrs. Banks on and say, "Did your son call you?" Now, then, poor old Delma responds to that telephone call and this thing is put in motion. Then Delma goes to Dallas, trusting a doper. Then Delma, from that [2296] minute forward, is hooked. They have taken Delma, a young kid, from a good home, who doesn't know anything about that kind of filth, and they have now got him and they're going to frame him to save their hides. It stinks. It stinks.

Ladies and gentlemen, when you read this Court's charge, you read what the law is, I submit to you when you analyze this evidence and you see who is believable and who is not, I submit that you will return a verdict of not guilty. Thank you very much.

MR. ELLIOTT: May it please the Court?

THE COURT: You may proceed.

MR. ELLIOTT: Mr. Cooksey.

MR. COOKSEY: Mr. Elliott.

MR. ELLIOTT: I'll tell you what stinks in this courtroom. I'll tell you exactly, if you're getting a funny smell in here, I'll tell you what stinks. It stinks that we've got a dead boy, sixteen years old, with not one single trace of narcotics in his bloodvein. Nothing to do with dope, whatsoever. That's what stinks. It stinks that we've just listened to a final argument almost a half an hour long that has not touched on the death

of this boy. It stinks that there is an implication that somehow everybody you saw in this courtroom is completely guilty and you know who the only innocent person in this whole house is? [2297] Why, it's Delma Banks, ladies and gentlemen, right there in the flash. The only one in this courtroom totally innocent of any wrong-doing. This is not an effort to tag somebody. This is not an effort to lynch or to go out and latch onto somebody and make them pay for that, but don't you realize how foolish, how stupid and how needless that would be? That would put us on the level of the person that did that to Richard. That would put us on his stupid level. We would be down there with him. That's not what this is about.

Charles Cook is not a suspect in this case. Charles Cook is not a suspect in this case. Drug habits—what evidence of drug habits have you heard? Charles Cook said yeah, I shot. His wife said, yeah, I helped him get them. You didn't hear a habit. You know the only person that you heard was strung out on drugs? Robert Farr. He said at one time he was strung out. Robert Farr is part of Delma's family. He didn't have a thing to do with Charles Cook. There is not one single witness in this entire case that has placed Charles Cook and Robert Farr together. Nobody has ever seen them together, and yet you're supposed to believe that there is some kind of grand conspiracy, and for what purpose? Mr. Cooksey tells you there is another reasonable hypothesis for this. What is it, Mr. Cooksey? You had your turn up here. Why didn't you tell us what the other reasonable Hypothesis was? You talked for thirty minutes. You [2298] say it happened another way. What other way, Mr. Cooksey? It's a conspiracy. Oh, yeah, can't we have a grand conspiracy with the likes of Marcus Jefferson and Robert Farr? Don't we have brillient minds working together? Marcus Jefferson, who walked into this courtroom wearing a T-shirt with the word "Animal" across it. Good mind at work. Good mind.

You are the sole judges of the credibility of the witnesses and the evidence in this case. Ask yourself if we rely on our conviction solely and strictly on Charles Cook, and the answer is no. Charles Cook didn't lead us to Dallas. Delma Banks led us to Dallas. No, that's not a coincidence. That's a lot of good, hard, solid police work. That's a lot of hours sitting and waiting for somebody that you suspect to make a wrong move. We knew who was with Richard on the night he died. Patricia Hicks told us that. Patty Bungardt told us that. It wasn't Charles Cook, was it? Mr. Cooksey says put Delma Banks in that car. Patricia Hicks did that. Patricia Hicks said that Delma got in the car. Mr. Cooksey says dust it for fingerprints. Why? We know he's in there. You have heard testimony to that effect. Patricia Hicks and Patty Bungardt both said they saw him in the car. That proves nothing. He says why didn't you get fingerprints off the beer cans? Well, the weather was inclement. It was snowing and it was raining. Think about that, folks. Think about the life expectancy of a fingerprint in the snow and the rain, if you [2299] will.

All this dope, all this talk—and that's all it is. It's talk. It's not evidence of dope. Nothing to do with this boy. Not one single stitch of evidence that this boy had anything whatsoever to do with narcotics. It's like I told you, folks. The issue in the case is who killed Richard Whitehead. Dope had nothing to do with it. But you have evidence; you have Delma saying, "I was sitting out there drinking the beer, and I was going to kill the kid for the hell of it and take his car." That's what you've got.

He says does this chance meeting on a Dallas street ring of truth? Isn't it a coincidence. Folks, if this is contribed and we're making this up, don't you think we would have done a better job? Don't you think we would have gotten somebody besides Charles Cook, if this is all a grand conspiracy against Delma Banks? I would love to have put somebody on that stand that does not have a criminal record and say, "Yes, I

heard him confess. I heard him say it." Didn't happen that way. I'm sorry. We brought you what we had, but bear in mind that the people that appeared here today did not appear because of our choosing. Delma sought them out. Delma Banks got in the boy's car that he had just killed, and drove to Dallas, and that brings us to an interesting point, and that is the car. We haven't shown you any evidence whatsoever that the Whitehead boy was killed and his car was taken. Well, folks, we have showed you evidence that the Whitehead boy was killed, and guess who showed up in the car? Delma Banks.

Let me correct one thing. Charles Cook, his wife, and Robert Farr did not tell you that they all shot Preludin. Robert Fair said Dilaudid. Okay? It's a little thing, but its the little things that count, folks. Mere circumstances.

THE COURT: You have five minutes.

MR. ELLIOTT: Thank you, Your Honor. We do not depend upon mere circumstances for conviction. Delma Banks is sitting there, talking about killing a white kid in Texarkana and shooting him three times in the head, and there is the exact description of that murder. It's not a circumstance. Then he is seen by Charles Cook, Charles Cook's wife, Carol Cook, Mr. Whiteurs, driving the dead boy's car; that's not a circumstance. That he leads Dallas police officers over there after that weapon is not a circumstance. Of course Delma is just being manipulated, isn't he? Who is doing the manipulation? These masterminds, Robert Farr and Marcus Jefferson, the T-shirt with "Animal" written on it. They look like the type of cunning mind that you could see manipulating an innocent person.

Mr. Cooksey says that this is a poor case. Why do you think he says that? Can you discern a motive why Mr. Cooksey wants to call this a poor case? You're right. He's right, really, when he says don't leave your common sense at

home. Think about why Mr. Cooksey would want to call this a poor case. Drugs, all these rabbit trails, all these smoke screens that he wants you to hide behind and chase down. He wants you to think about anything except that sixteen year old boy with three bullet holes in him. Anything at all. The State has produced the only evidence in this case.

* * * *

MR. ELLIOTT: The point is this. Mr. Cooksey's opinions are not evidence. Mr. Cooksey's questions are not evidence. Mr. Cooksey's fine argument is not evidences. That is not evidence. Talk is not evidence. I am sick to my heart to think that we could produce this much proof and stand here and doubt as to whether or not the State has proved its case. We may as well burn this courthouse down and go away if we come up with any other verdict other than guilty of capital murder, because there will be no justice in Bowie County. You've been put to a hard task, and that is the task of doing what is right. It's an old task, but it's in you. The hand of God is upon our country and in our laws and I ask you to stand up for what's right. I ask you to come forward for what's right and what's good and what is worth preserving in our society. I ask you to do what's right. Return a verdict based on the evidence in this case, consider the evidence in this case, and it can lead but to one conclusion and that is that Delma Banks is guilty of capital murder. I want you to go from this place proud and holding your head high. I want you to go from this place with courage. I do not want you to be ashamed of what you have done here, and if you do not return a verdict of guilty, you will be ashamed.

* * * *

VETRANO JEFFERSON

* * * *

DIRECT EXAMINATION

BY MR. RAFFAELLI:

THE COURT: Mr. Raffaelli, you may proceed.

Q Thank you, Your Honor. State your name, please, sir.
A Vetrano Jefferson.

* * * *

Q Thank you. Mr. Jefferson, where do you reside?
A Sir?
Q Where do you live?
A 2324 West 18th.
Q How old are you, sir?
A Twenty.
Q And, Mr. Jefferson, do you have a sister who is the wife of Delma Banks?
A Yes, sir.
Q Okay. Let me direct your attention to the early part of April, around April 7th of this year, and ask you if you and Delma Banks had an argument or quarrel that day, please, sir?
A Not really.
Q Did not?
A No.
Q Okay, sir. Did you file a . . .

* * * *

Q Okay, sir. Did you and Delma Banks have an altercation or a fight back in the early part of April?

* * * *

Q Thank you. Did you and Delma Banks have a fight back in the early part of April?
A Yeah, kind of a fight.
Q Kind of a fight?
A Um-hum.

Q Okay. I notice on the left-hand side of your face, approximately here, Mr. Jefferson (indicating on his own face), there is a scar. Could you turn a face the jury, please, sir?
A (Witness turns.)
Q When did you receive that scar?
A It was the night that he came over there.
Q Came over where?
A Over to my house, rather.
Q Okay, who put that scar upon you?
A Delma Banks.
Q How did he inflict that scar, sir?
A With a pistol.
Q Could you tell us how he did it?
A He had the gun, butt part in his hand, and hit me across the face with it.
Q Okay, sir. Did that occur inside the home?
A Yes, sir.
Q Did you leave your home at that time or shortly after that?
A After I got hit, I were going outside to get in my car and go to my mother's house.
Q Okay, did he follow you outside?
A He went out before I did.
Q Okay, while you were outside did he threaten you?
A Yes, sir.
Q What did he threaten to do, if anything, sir?
A He told me that he would—he was going to kill me, you know, because he thought I was going to reach in the car for something.
Q Okay.
A Which I was going in there to get a screw driver to start my car with, because it wouldn't work on account of the switch.
Q Did your sister step in front of you two and break the fight up, and that ended it?

A Yes.
Q And that occurred in April of this year? Is that correct, sir?
A Yes, sir.
Q Pass the witness.

* * * *

CROSS EXAMINATION

BY MR. COOKSEY:

Q Vetrano—excuse me, Your Honor.

THE COURT: You may proceed.

Q Are you still in jail?
A Yes.
Q I pass the witness. Let me ask you this, Vetrano. When you say that Delma threatened you, he thought you were reaching in your car to get something?
A Yes.
Q Pass the witness.

MR. RAFFAELLI : I have no further questions.

* * * *

[2319] ROBERT FARR

a witness recalled by the State, still being upon his oath, further testified as follows, to-wit:

RE-DIRECT EXAMINATION

BY MR. RAFFAELLI:

Q State your name again for the record, please, sir.
A Robert Farr.
Q And you are the same Robert Farr that has previously testified, are you not?
A Yes.

* * * *

Q Okay Mr. Farr, directing your attention to the latter part of April of this year, I believe you previously testified that you and Marcus Jefferson, I believe, and Delma Banks went to Dallas, Texas. Is that correct, sir?
A That's correct.

* * * *

Q State your name again, please.
A Robert Farr.
Q And, Mr. Farr, as I was previously saying, you are the same Robert Farr that testified previously in this trial, are you not?
A Yes.
Q And I believe you stated that you, Marcus Jefferson, and Delma Banks went to Dallas, Texas with—during the latter part of April. Is that correct, sir?
A Yes.
Q What was the purpose of going to Dallas at that time?
A To pick up a pistol.
Q Okay sir, and did y'all pick up a pistol?
A We did.
Q Who went and got that pistol?
A Who went and got the pistol?
Q Yes.
A Delma got the pistol.
Q Did he go up to the front porch, himself?
A Yes, he did.
Q Whose pistol did y' all go after?
A His pistol.
Q What statement, if any, did he make when he returned from the car—I mean from the porch?
A He said,"Will this do?"
Q Now. . .

* * * *

A He said, "Will this do?" And, he said his gun was over in West Dallas; that Two-two had let some woman have his gun over in West Dallas.

Q What did he mean by the statement, "Will this do?"
A Going to go pull a robbery, I guess.

* * * *

Q What did he mean by the statement, "Will this do?"
A He said would this do, because the gun that we went after, it was a small type of gun and we needed a small type of gun.
Q What did you need a small type of gun for?
A To conceal it.
Q Okay, sir. After you were driving away, what did he tell you to do with the gun that you had retrieved from that porch?
A He asked me to load it.
Q What type of gun was that?
A .22.
Q Did you load it?
A No.
Q What did he say, if anything, that y'all were going to do at that time?

MR. COOKSEY: Your Honor. . .

A He didn't.

* * * *

Q What were y'all going to do at that time? Let me reword that. What did he want to do at that time?
A I don't know. We were going to pull some robberies on the way back.
Q Okay, in other words you were going to pull a robbery on the way back. Now what do you mean—where were you going to, on the way back where?
A To Texarkana.
Q How many of you had guns?
A No one; there was only one gun.
Q Who had that gun?
A Delma had the gun, but the gun was in the car.

Q Did you ask him or make inquiry, what if there was any trouble during these burglaries, what he would do?
A Yes, I did.
Q What did he say, if anything?
A He said he would take care of it.
Q How did he say he would take care of it?
A He didn't go into any specifics, but he said it would be taken care of.
Q Okay, sir, and—pass the witness.

CROSS EXAMINATION

BY MR. COOKSEY:

Q Robert, y'all went to Dallas in your car, didn't you?
A We did.
Q Before you left here, you called Willie Huff and told him you were going to Dallas, didn't you?

MR. RAFFAELLI: Your Honor. . .

A No, I did not.

* * * *

Q Robert, didn't you call Willie and tell him you were taking Delma to Dallas?

A I did not.

Q Well, tell the jury this, Robert. Did you go up in Arkansas last week and bust some phony scripts?
A No, I did not.
Q You didn't almost get in a fight with a doctor in Arkansas last week because he wouldn't prescribe some dope for you?
A No. I asked him for the medication, he wouldn't give it to me, and that's all it was.
Q There wasn't a black man with you that had to apologize to the doctor and try to get you out of there?

A Not that I know of. There was a black man with me, but wasn't no apologizing to a doctor. I didn't know anything about that.

Q Robert, didn't you bust some bogus scripts in Arkansas last week?

[2328] A No.

Q And that testimony is just as true as all this that you say about Delma, isn't it?

A That's right. I did not bust any scripts in Arkansas last week.

Q And you know that you're drawn up tight over that, and you're going to testify to anything anybody wants to hear, aren't you, Robert?

A Can you prove it?

Q I asked you a question, Robert.

A No, can you prove it?

Q Did you . . .

A I did not crack no scripts in Arkansas last week.

Q Your Honor, would you instruct this witness to answer my questions?

THE COURT: You may answer his questions, and you are directed to answer his questions.

A No, I did not bust any scripts.

Q And the truth of the matter is, Robert, you went to Dallas in your car and you got Delma to go, and Robert, when the cops got you up there, you were holding narcotics then, weren't you?

A No.

Q Well, what about your narcotic paraphernalia?

A I was holding a syringe when they stopped me, but I was not holding any narcotics.

Q Did you get busted for possession of narcotics paraphernalia?

A Did I get busted?

Q Yes, sir.

[2330] Q Robert, you told Delma to go to Dallas, that you had a friend up there that had a gun that he wanted y' all to keep, didn't you?

A That's not true. When we were stopped, I told the officers that that was my syringe.

Q Did they bust you for it?

A No, they didn't file no charges on me.

Q Did they take you to jail, Robert?

A Yeah, they took me to jail.

Q After they took you to jail, and after they got your paraphernalia . . .

MR. ELLIOTT: Your Honor, we would object.

Q . . . they did not charge you?

MR. ELLIOTT: He has asked the question that the Court allowed, and now he is going further.

THE COURT: I'm going to sustain the objection.

Q I may not pursue that line of questioning, Your Honor.

THE COURT: You may not pursue it because he answered that they did not bust him, as I understood the witness's testimony.

Q Robert, so that you and I are real cost, did you bust any script over in Arkansas in the last few weeks?

[2331] A No.

MR. ELLIOTT: We would object to that as being improper impeachment, Your Honor, and irrelevant to this trial.

THE COURT: Mr. Cooksey, I don't see that this is relevant to this particular trial.

Q Your Honor, I am attempting to show this jury why this man would get up and tell these things, and that this man is not worthy of belief. That he has a reason to protect himself

from all these charges, and of course that's why he is going to testify like he is.

A Mr. Cooksey. . .

THE COURT: Well, now. . .

A . . . I have only been back here three weeks.

THE COURT: No outbursts from the witness until the question is asked. Okay? And I will instruct the jury to disregard any statement that the witness might have made which was not in response to the question. You will completely disregard it. I did not hear it, I don't know what it was, but you are to disregard it. Now I'm going to sustain the objection made by the State to the line of questioning as defense counsel is pursuing.

Q Note my exception.

THE COURT: All right, sir.

[2332] Q Do you know James Kelley?

A Yes, I do.

Q And James Kelley, was he with you when you went up to the doctor's office?

A He was.

Q Was James Kelley with you when you busted some script?

A I did not bust any script.

Q Okay. I just wanted to get your answer. Do you know Gary Owens?

A I do.

Q How do you know Gary?

A Because he's a narcotics officer.

Q In Arkansas?

A Yes.

Q Did you snitch for him?

A No.

Q You've been in a gunfight, haven't you, Robert?

MR. RAFFAELLI: Objection, Your Honor.

THE COURT: I'm going to sustain the objection.

Q Robert, did your wife shoot you?

A No.

* * * *

[2338] DELMA BANKS, SR.

* * * *

DIRECT EXAMINATION

BY MR. COOKSEY:

Q State your name, please.

A My name is Delma Banks.

Q You are Delma, Sr.

A That's right.

Q Where do you live, Mr. Banks?

A I live at Nash.

Q And are you employed, sir?

A I have a j ob at Red River.

Q I'm sorry, I didn't understand you.

A I said yes, I have a job at Red River.

Q All right, sir, and what is your wife's name?

A Allean Banks.

Q And how many children do you have, Mr. Banks?

A Six.

Q And Delma, Jr. is your son, isn't he?

A That's true.

Q What kind of education does Delma have, Delma, Jr.?

A Well, this was his last year in school, and he had a few months and he was going down here to Dunbar to finish. He had about two quarters, I believe it was, one or two quarters, that he was lacking before he finished high school.

Q Okay, and tell the jury what kind of son [2339] Delma has been to you, Mr. Banks.

A Well, he has been a nice son. He always obeyed me, and he got in a little trouble back and forward but it didn't amount to much because we didn't allow him to get with the wrong bunch, you know. And so I say he was a real nice kid because he grew up in church; and sometimes people grew up in church just strayed off, so this way he just got with the wrong bunch.

Q All right, sir. Mr. Banks, are you asking this jury to save your son's life?

A Sure is, please. Begging. I don't think he will do nobody no harm. As a matter of fact, I know he won't.

Q Where does Delma fit in the line of your six children?

A Well, the way I—I try to have a little love for all of them. I don't . . .

Q But I mean age-wise, Mr. Banks.

A Age?

Q Yes, sir.

A Well, he's the oldest. I mean next to the oldest, because I have an older daughter.

Q You have a girl?

A Girl.

Q And then Delma, Jr.?

[2340] A Then Delma, Jr. He is next to the oldest.

Q How many children do you still have at home?

A I have four at home.

Q All right.

A Well, five, with him. See, he was living with us from time to time.

Q Anything else you would like to tell this jury, Mr. Banks?

A Well, I can't think of anything to tell them. I just hope that they will spare my son's life, please.

Q Pass the witness.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Banks, you love your son very much, don't you?

A Quite sure everyone does.

Q You would do anything you could to help him, wouldn't you?

A Not if it was wrong, I wouldn't.

Q Not if it was wrong?

A No, I don't hold up for nobody, no wrong.

Q Nothing further.

* * * *

[2357] THE COURT: Let the record show that this hearing is held in Judge's chambers, outside of the presence and hearing of the jury, the jury having been recessed for lunch. In the Judge's chambers are the defendant, defendant's counsel, defendant's counsel's investigator, the court reporter, and the Judge.

MR. COOKSEY: Delma, as you know, last night at about 11:00 o'clock, a little after, the jury in this case came back and found you guilty of capital murder. You understand that, don't you, Delma?

DELMA BANKS, JR.: I understand they said I was guilty.

MR. COOKSEY: Okay. We are now in the punishment phase, and, Delma, I want you to understand that under Texas law as it is today, the jury can only assess one of two authorized punishments by law. One is a life imprisonment sentence, and one is the death penalty. You understand that, Delma?

DELMA BANKS, JR.: (No audible response.)

MR. COOKSEY: You have to speak up. She can't take your head nod.

DELMA BANKS, JR.: Yes.

MR. COOKSEY: We at this point are putting on our witnesses in the punishment phase. I think, [2358] Delma, in all honesty that we can hurt you by putting on any more preachers and ministers, pastors, Rabbi's or Fathers. I think that the jury is going to get too much of it; they are going to get overexposed to it, and I think that it could hurt you. But all those people you have out there, if you desire, I will call them to the last person. You tell me what your wishes are.

DELMA BANKS, JR.: I don't understand.

MR. COOKSEY: Well, Delma, what I'm saying to you is if I keep calling preacher after preacher after preacher after preacher, I think that they're going to backfire on us. I think it's going to backfire on us. I think you can overexpose a jury to that. Now that is just my opinion, from my years of experience.

DELMA BANKS, JR.: All right.

MR. COOKSEY: What I'm saying to you, though, everybody you've got on that list, I will call if you want me to.

DELMA BANKS, JR.: Just pick the right ones out?

MR. COOKSEY: Well, who do you want me to call? You know these folks a whole lot better than I do.

THE COURT: Is he gone after a [2359] list (indicating Mr. Waters)?

MR. COOKSEY: Yes, sir.

THE COURT: You might have him to go over the list and look it over and see which ones you want him to call.

MR. COOKSEY: Delma, at this point we have called your daddy, we have called Reverend Ford, Reverend Gullette, Reverend Lewis. Okay? And Mr. Frank McGill. You have left on your list Curtis Dismuke, J. M. Williams, E. Fields, Roosevelt Hyman, Louis Austin, Mary Davis, and George McGraw. Now, Delma, I want to tell you that in my opinion I

think you should put your mother on the stand. I think you should add your mother to the witness list. Okay?

DELMA BANKS, JR.: All right.

MR. COOKSEY: What I want to know is out of these people listed on this yellow sheet that I have just named, who in there, since I don't know these people, I don't know any of those people, I don't know how well they know you and how long they have known you. You know that. You know them a lot better than I do. Who on this list do you want me to call?

DELMA BANKS, JR.: None of them, I guess.

MR. COOKSEY: Why not?

[2360] DELMA BANKS, JR.: So it won't influence the jury.

MR. COOKSEY: Well, we want to influence them a little.

DELMA BANKS, JR.: Not influence. May be a little bit like you were saying a while ago.

MR. COOKSEY: Who are all these people?

DELMA BANKS, JR.: Pastor, cousins.

MR. COOKSEY: Is Mary Davis a relative?

DELMA BANKS, JR.: Friend. George McGraw, his son used to go with my sister.

MR. COOKSEY: What does he do for a living?

DELMA BANKS, JR.: He's a preacher. He was, I don't know if he still is or not.

MR. COOKSEY: Just tell me, Delma, who on this list you want me to call.

DELMA BANKS, JR.: Nobody.

MR. COOKSEY: You're sure?

DELMA BANKS, JR.: Yeah.

MR. COOKSEY: Your Honor, would you explain to my client his right to call people? What is the—I can't ever remember this guy's name, out here. We've [2361] got to call him. James Kelley. Now, Delma, James Kelley is a witness that we have dug up, who will testify that Robert Farr hired him and they went up into Arkansas, and Robert passed a bunch of forged prescriptions for drugs; and that he went in this doctor's office, and finally James Kelley heard him and he and a doctor were just about into a fight and all that, and that will discredit Robert Farr. You see?

DELMA BANKS, JR.: Yes, sir.

MR. COOKSEY: I think we have got to call James Kelley.

DELMA BANKS, JR.: All right.

MR. COOKSEY: We've got to call your mother.

DELMA BANKS, JR.: Okay.

MR. COOKSEY: And is there anybody else you want to call?

THE COURT: You understand you can call all of those people to testify or none of those people to testify or any part of those people to testify? You understand? These are character witnesses. Now you know what a character witness is. They don't know anything about the facts of the case. They have known you, and their purpose of being on the stand is to talk about your character, when they knew you, whenever. You understand that?

MR. COOKSEY: Speak up, now.

[2362] DELMA BANKS, JR.: Yes, sir.

THE COURT: Now do you want your attorney to call any of those, other than the two he was mentioning, your mother and whoever the other fellow is, Kelley do you want him to call any more character witnesses on your behalf?

DELMA BANKS, JR.: No, sir.

THE COURT: I mean the main thing—again, I don't care whether you call them or you don't call them. You understand that? Just so long as you understand that you have a right to call these or anybody else that you want to call as a witness.

DELMA BANKS, JR.: Yes, sir.

THE COURT: whether they are on this list or not, we'll stay here and let you call anybody that you want to, or as many as you want to. You understand that?

DELMA BANKS, JR.: Yes, sir.

THE COURT: Okay. That's all that this court is interested in, that you just fully understand this.

MR. COOKSEY: Delma, you're telling the Judge you fully understand that you can call these people? You understand that?

DELMA BANKS, JR.: Yes, sir.

[2363] MR. COOKSEY: And you say that the only ones you want to call now are James Kelley and your mother?

DELMA BANKS, JR.: Yes, sir,

MR. CCOKSEY : Now, Delma, do you remember in the first part of this trial where I explained to you that you had the right to testify, but you didn't have to testify?

DELMA BANKS, JR.: Um hum.

MR. COOKSEY: That it was your decision, and your decision, alone?

DELMA BANKS, JR: Yes, sir.

MR. COOKSEY : Now, Delma, at this phase of it, at this point, it has now come tine again for you to make an election and a decision; just as it was in the first phase of this trial, in

this part you can either testify on your own behalf, but you certainly don't have to. You understand that?

DELMA BANKS, JR.: Yes.

MR. COOKSEY: Now fully understanding that, what is your desire as far as testifying in your own behalf or not testifying?

DELMA BANKS, JR.: I'll testify.

MR. COOKSEY: All right, now you understand that you don't have t o testify, don't you?

DELMA BANKS, JR.: Yes, sir.

MR. COOKSEY: And nobody can make you testify. Right?

DELMA BANKS, JR.: Right.

MR. COOKSEY: But it is your decision that you desire to get on the stand and testify?

DELMA BANKS, JR.: Yes, sir, it is.

MR. COOKSEY: Okay, sir. Your Honor, I am totally convinced that my client understands his rights in that regard, and his right to call witnesses.

THE COURT: Let me inject this, to be sure that he understands.

MR. COOKSEY: All right, sir.

THE COURT: Now you understand if you testify, that the State has a right to ask you some questions, too? You understand that?

DELMA BANKS, JR.: Yes, sir.

THE COURT: Okay. In other words any time, Delma, any time that you take the stand, both sides—or any witness takes the stand, as you have seen it in this trial, if the State puts on the witness, then your attorney had a right to ask them some

questions. If you take the stand, they have the right to ask some questions. If you take the stand, they can ask you some questions, too. Do you understand [2365] that?

DELMA BANKS, JR.: Um-hum.

MR. COOKSEY: Speak out, now.

DELMA BANKS, JR.: Yes, sir.

THE COURT: Okay. Now again, the only thing that the Court is here for, is not trying to influence you to take the stand or not to take the stand. This is a decision that you, yourself, make; but all the Court is interested in doing is that you fully understand what your rights are and what your options are, and the procedure that is followed. I want you to understand that, and are you telling me you understand what the procedure is, as I explained it to you?

DELMA BANKS, JR.: Yes, sir.

THE COURT: All right.

MR. COOKSEY: All right. Now, Delma, let me tell you this. The State will be somewhat limited in their cross examination of you. You see, this jury has already found you guilty of killing Richard Wayne Whitehead. They may not interrogate you about that, because that issue has been settled by this jury, but they can ask you about you getting into it with Vetrano Jefferson. They can ask you about planning armed robberies. They can ask you about all that stuff, and realizing that, do you still desire to take the stand and testify in your own behalf?

[2366] DELMA BANKS, JR.: Can I have an opinion from you?

MR. COOKSEY: Well, yes, Delma, I will give you my opinion. I am honestly of the opinion that if the jury does not hear from you somewhere, and if they don't see a tear, like I see right now, it is my opinion that they will inflict the death

penalty. They will vote in such a way as to require the Court to impose the death penalty. That is my honest opinion. That opinion could be wrong, but that is my honest opinion.

DELMA BANKS, JR.: I know I want to testify.

MR. COOKSEY: Now I can't guarantee you that even though you testify, that they're not going to give you the death penalty. You understand that, don't you?

DELMA BANKS, JR.: Yes, sir.

MR. COOKSEY: So realizing all that, do you still-I mean the Judge has no control over this jury. I have no control over this jury. They simply have to answer those questions. Okay?

DELMA BANKS, JR.: Yes, sir.

MR. COOKSEY: So realizing all that, do you still desire to testify?

DELMA BANKS, JR.: I sure do.

MR. COOKSEY: Okay. Delma, is [2367] there anything at this point that you feel like you don't understand?

DELMA BANKS, JR.: Yes.

MR. COOKSEY: What?

DELMA BANKS, JR.: On the circumstancial evidence.

MR. COOKSEY: On circumstancial evidence?

DELMA BANKS, JR.: Um-hum.

MR. COOKSEY: What is it you want to know?

DELMA BANKS, JR.: The way the example that you was giving, you know, during—like I say, I don't know nothing about this, and I just remembered it, and on the example you was giving, I didn't see none of that. I didn't see them rule out none of that.

MR. COOKSEY: Well, that's not for us to see. The jury has total discretion in finding the facts in any case. I mean the Judge can only instruct the jury in matters of law; the attorney can only present their talks or arguments or summation to the jury, and the jury can determine the facts to be any way they want to determine them. The jury says that you shot and killed Richard Wayne Whitehead. That fact is established.

DELMA BANKS, JR.: I-well, I guess [2368] it is, but if they didn't find nothing in my possession, how they find me guilty?

MR. COOKSEY: That's correct. They believed, apparently, the testimony of Two-two, Charles Cook. Okay?

DELMA BANKS, JR.: All right.

MR. COOKSEY: Anything else you would like to ask me?

DELMA BANKS, JR.: No, sir.

MR. COOKSEY: Anything you want me to do for you, other than present these other witnesses?

DELMA BANKS, JR.: Nothing that I can think of.

MR. COOKSEY: Okay.

THE COURT: All right.

MR. COOKSEY: Thank you, Your Honor.

THE COURT: You're welcome.

(At this time the noon recess was observed by all parties, after which the jury was returned to open court, all parties were present, and the following proceedings were had, to-wit:)

* * * *

JAMES KELLEY

* * * *

DIRECT EXAMINATION

BY MR. COOKSEY:

Q State your name, please.
A My name is James R. Kelley.
Q Where do you live?
A I live at 2319 West 18th Street.
Q Is that in Texarkana, Texas?
A Yes, sir.
Q How old are you?
A Twenty-eight years old.
Q James, do you know Robert Farr?
A Yes, sir.
Q How do you know Robert?
A Well, he and I, we go with two sisters.
Q Did you and Robert take a little trip though Arkansas recently?
A Yes, sir.
Q Tell the jury about that.
A He hired me to take him to Nashville, Arkansas. Said that he wanted to go down there and get a prescription filled, and I carried him down there and we got down there and he asked me if I would set in the car, so I set in the car, you know, and he went in there and stayed a little while so, you know, I got tired of setting in the car and I went inside the hospital there and when I got in there, him and the doctor was fussing a little bit and the doctor told him to get on out of there.

Q The doctor actually used some profanity, didn't he?
A Yes, sir.
Q Told him to get his ass out of there, didn't he?
A Yes, sir.
Q And what did you do?

A I told—I asked Robert what was going on, you know, because I didn't really know, you know, what he—you know, what he had done, and I asked him, I said, "What's wrong?" He said, "Nothing, man." That he was—the doctor told him to take his papers and go. He said—he asked the doctor was he going to let him have the stuff, and the doctor told him, said, "No, you got all you're going to get. Just get out of here."

Q All right, did you apologize to the doctor?
A I told the doctor that I didn't know what was going on, and the guy had hired me to bring him down there.
Q Where did you and Robert go after that?
A Went to DeQueen, Arkansas.
Q What did you do at DeQueen?
A Went to another hospital, and I sat outside again and waited on him, you know, and he went in there and he stayed in there about two hours, I guess, and then I went inside in another part of the hospital and sat down in there and waited on him until he come out.
Q Where did you go then?
A We left there and went to Ashdown.

* * * *

Q You went to Ashdown?
A Yes, sir.
Q What occurred at Ashdown?
A We went to Ashdown Hospital, and when we got there—we went there, it was a nurse or something standing on the porch out there, and he asked her if some doctor was in there, or something, and she told him no. So he, you know, come on back to the car, and then he wanted me to take him somewhere else and I told him, you know, I hadn't eaten anything all that day and I didn't have any money, so I was trying to get back home off the little gas that I did have, because I didn't think that he had any more money either, you know.

Q All right, did he make any statements to you on the way home?

A Well, he was just—he talked about, you know, telling me about his wife, his old lady; said that he was, you know, thinking about just going back to Oklahoma, and he said that he didn't know whether they was going to be able to make it, or something, and he said that he was going back to Oklahoma. And then we got on talking about Delma, you know, and he just . . .

* * * *

Q Now, James, what did Robert say?

A Well, you know, he just—he told me about when they went to Dallas, and all this. He said that, you know, he said that Delma didn't do that and they just—you know, he just told me just like that. He said, "Delma didn't kill that boy, Kelley." And I asked him, I said, "How do you know?" You know, so he didn't—you know, he wouldn't talk to me no more about it.

* * * *

Q James, did Robert make any reference to obtaining some stuff? Did he say anything about getting some stuff?

A He said whenever—he said that he was going to get what he was after before we got back to Texarkana.

Q Did he say he had to have the stuff?

A Yeah, he said he had to have it before we got back to Texarkana.

Q I pass the witness.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q James, are you nervous?

A Yes, I'm nervous.

Q You're telling the truth, aren't you?

A Yes, sir.

Q Then why are you nervous?

A I'm always nervous like that, around a bunch of people.

Q Do you need something to settle down your nerves a little bit?

A No.

Q You don't need anything?

A No.

Q You don't use drugs, yourself?

A Depends on the type of drug.

Q All right, why don't you tell us about the type of drug.

A I don't know too much about drugs.

Q You don't?

A No.

Q What did you go to Arkansas for?

A I carried a man up there, but he paid me. He hired me.

Q And you said you didn't know what he was up there for, didn't you, James?

A I did not know what he was up there for.

Q Even after you went in the hospital and got him and drug him back out, you didn't—you still didn't know what he was up there for?

A I knew what he was up there for then.

Q And you stayed with him, didn't you?

A Stayed with him?

Q You kept toting him around, didn't you?

A The man had paperwork to go in and see a doctor, and that's as far as I know that he had.

Q And you didn't think there was anything strange about you having to go in the hospital and drag him out?

A I didn't have to drag him out. I just went in and asked him what was wrong, and he said everything was all right.

Q And you went from doctor to doctor to doctor to hospital to hospital to hospital, and you drove that car, didn't you?

A That's right.

Q And you're up here testifying today because you're a good citizen, aren't you?

A Well . . .

Q Why are you up here, James?

A Why am I up here?

Q That's what I said.

A I'm here because Robert—this is what he said.

Q Because that's—you're here because of what? Did Robert ask you to be here?

A No, he didn't ask me to be here.

Q Who asked you to be here?

A I was just here last night, and my old lady was here, and . . .

Q Who asked you to come to court this morning? I want an answer.

MR. COOKSEY: Your Honor. . .

A I asked myself to come.

* * * *

Q That's all I want to know. Who subpoenaed you up here?

A Who subpoenaed me?

Q Yeah.

A They—well, when I was here last night, I talked to the Sheriff and they—he subpoenaed me.

Q Whose sister do you go with?

A I go with Marcus Jefferson's sister.

Q Is there any relationship between Marcus Jefferson's sister and Delma Banks?

A And Delma Banks?

Q Yes.

A Well, Delma Banks go with one of her sisters.

Q That's right. You're part of the family, aren't you?

A No, I'm not part of the family. I'm not married. I say I go with her.

Q Where were you on or about April 12,1980?

A Where was I what, now?

Q April 12, 1980.

A April 12, 1980?

Q Yeah.

A I don't really know.

Q Were you with Delma Banks?

A No, I was not with Delma Banks.

Q Do you know anything about this case on trial here?

A No, sir.

Q You can offer no personal knowledge with regard to this case on trial here, can you?

A No, sir.

Q You don't know a thing, other than you toted Robert Farr around for a little money, and that's all [2379] all you know?

A That's about the size of it.

Q That's right. That is about the size of it.

* * * *

GARY OWEN

* * * *

DIRECT EXAMINATION

BY MR. COOKSEY:

Q State your name, please.

A Gary Owen.

Q Mr. Owen, how long were you with the Arkansas Police Department?

A Approximately ten and a half years.

Q Were you ever in the Criminal Intelligence Division?

A Yes, sir, around nine years of that time.

Q Mr. Owen, do you know a man by the name of Robert Farr?

A Yes, sir, I do.

Q And do you know him from your police work.
A Yes, sir, I do.
Q Is Robert Farr a doper?
A Yes, sir, he is.
Q How long have you known Robert?
A I have known Robert approximately seven to eight years, somewhere along in there.
Q Everybody in the Police Department, especially the Criminal Division, knows him, don't they?

* * * *

[2380] Q How long have you known him?
A Around seven to eight years.
Q Have you delt with Robert on many occasions?
[2381] A Yes, sir, I have.
Q Let me ask you this, sir. Is Robert Farr a truthful person?
A No, sir, he is not, in my opinion.
Q Would you believe Robert Farr under oath?
A No, sir, I would not.
Q Pass the witness.

CROSS EXAMINATION

BY MR. ELLIOTT:

Q Mr. Owen, what are your duties with ID, or what were they?
A What were my duties?
Q Yes.
A I was in Investigation, I was over Intelligence, and I have been Supervisor of Narcotics and Vice.
Q Narcotics. Did you ever use Robert Farr?
A Yes, sir, I did.
Q Did he give you good information?
A No, sir.
Q How long did you use him?

[2382] A I never did use him but once or twice, and his information was not correct and I didn't use him any more.
Q You didn't rely on Robert Farr at all?
A No, sir, I did not.
Q In other words one tine the information that he gave you was wrong, and so you're willing to sit here on that stand and say based on that one time, you don't believe anything he says?
A I didn't say one time, sir. I said two or three times, and I never used him any more.
Q Well, now we're up to two or three. What did you use him? One? Two? Three?
A Two or three times.
Q Is that the limit of it?
A That's the limit of it.
Q Who do you work for?
A I'm not employed at this time. I'm fixing to go into business for myself.
Q Who are you seeking employment with?
A I'm fixing to go into business for myself.
Q What kind of business?
A Polygraphs.
Q Who are you going to work for then?
A Myself.
[2383] Q Who are you going to work in conjunction with?
A With businesses I can get the business from.
Q Have you contacted Dennis Waters?
A Have I contacted him?
Q Yes.
A Yes, I have talked to Dennis several times.
Q You're wanting to do some business with Dennis Waters, aren't you?
A Yes.
Q And you want Dennis Waters' good favor, don't you?
A Yes, sir.
Q I think you got it.

RE-DIRECT EXAMINATION

BY MR COOKSEY:

Q Mr. Owen, has—to your knowledge has Robert Farr ever been shot?

A Yes, sir, several years ago, I believe.

* * * *

A I believe it was several years ago, he was shot in the head. Mr. Cooksey.

Q All right, did his wife shoot him?

A I believe that's correct.

Q What about . . .

MR. ELLIOTT: May we take this witness on Voir Dire, Your Honor?

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. ELLIOTT:

Q Do you know any of this of your own personal knowledge, or is it just what you have heard?

A I believe I . . .

Q Don't tell me what you believe. Do you [2385] know it of your own personal knowledge? Did you see it?

A No, I did not.

* * * *

RE-DIRECT EXAMINATION

BY MR. COOKSEY:

Q Do you know of your own personal knowledge Mr. Owen, whether Farr has a criminal record in Arkansas?

A He was arrested in '73, for forgery and uttering.

Q Thank you, sir.

MR. ELLIOTT: Nothing else.

THE COURT: You may step down and go back outside. Call your next witness.

* * * *

DELMA BANKS, JR.

[2389] a witness called on behalf of the Defendant, upon being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, thereafter testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. COOKSEY:

Q Your name is Delma Banks, Jr.?

A Yes, sir, it is.

Q Delma, you are the defendant in this case?

A Yes, sir.

Q You understand, don't you, Delma, that this jury has found you guilty of capital murder?

A Yes, sir—not really, I don't understand.

Q Well, I know you don't understand, Delma, but I'm saying that this jury has. You know that?

A Yes, sir.

Q And, Delma, you have been in these proceedings and you knew, just as these jurors know, that the jury only has two options open, don't you?

A Yes, sir.

Q Which will result either in a life sentence or a death sentence.

[2390] A Yes, sir.

Q Would you tell the jury, Delma, that you want to live?

A I do.

Q Would you tell them why?

A Because no one wants to die; at least I don't, especially for something I didn't do.

Q Delma, that's beside the point. This jury has found now guilty, and it's now time for them to assess punishment. Would you tell this jury why you want to live?

A Because I want to live.

Q Delma, you have never before been convicted of a felony, have you?

A No, sir.

Q Did you and Robert Farr plan some robberies?

A Robert Farr planned those, sir. He robbed them.

THE COURT: Just a minute. This juror says she can not hear, so you'll have to speak up a little louder so that the jurors—I have this turned all the way up, but you'll have to get a little closer or speak up.

Q Did you ever plan to rob anybody, Delma?

A No, sir, I haven't.

Q When you went to Dallas, Delma, and Robert [2391] Farr was with you, whose car were you in?

A Robert's.

Q Who came and got you, to go to Dallas?

A He did.

Q Did you drive Robert to Dallas at his request?

A No, he started driving and he was kind of high, and he was nodding out and he would go to sleep and close his eyes, and I told him it would be best for me to drive so we didn't get hurt on the way. That's the reason I ended up driving the car.

Q Was it your idea or Robert's idea to go to Two-two's house?

A My idea to go get the gun.

Q Why were you going to go get the gun?

A So he could pull one.

Q He wanted you to go get him a gun?

A Yes, sir, he did.

Q Did you know Robert was a doper?

A Yes, sir.

Q Didn't he have some dope with him when y'all went to Dallas?

A Yes, sir.

Q And when y'all were arrested, didn't he have some dope? [2392] A He had two pills left, yes, sir.

Q Had he been shooting dope that day?

A He shot some at his house before we left. Yes, sir.

Q Delma, you know, don't you, that association with these kind of people always leads to trouble, doesn't it?

A Yes, sir.

Q Have you learned your lesson, Delma?

A I sure have.

Q You look at that jury, Delma, and you tell them that if they will not impose the death penalty, you tell them what you're going to do with the rest of your life.

A Stay away from bad company, really. Be by myself.

Q You need a drink of water? Delma, weren't you raised in a good family?

A Yes, sir, I was.

Q Your mother and daddy are good people?

A Real good.

Q They take you to church?

A Yes, sir.

Q You promise this jury, Delma, that you will do something constructive with what is left of your life?

A I will.

Q I'll pass the witness.

CROSS EXAMINATION

BY MR. RAFFAELLI:

Q: Please the Court, Delma, you were here when Vetrano Jefferson testified, were you not?

A: Yes, sir.

Q: You saw that scar on the left-hand cheek of his, approximately right here (indicating), did you not?

A: Yes, sir.

Q: Did you inflict that scar upon him in April of this year?
A: I believe I did.
Q: How did you do that?
A: I hit him with a gun.
Q: Did you threaten to kill him at that time?
A: Yes.
Q: And you're telling me the latter part of April that you went back to Dallas, did you not?
A: The dates, I don't know, but I did go back to Dallas.
Q: You went back to Dallas.
A: Yes, sir.
Q: And at that time you went with the purpose to get your gun. Is that correct?
A: No, sir.
Q: Did you get your gun when you went to Dallas?
A: No, sir, I didn't get my gun. I got one gun, his gun. Two-two's gun.
[2395] Q: Two-two's gun?
A: Mine wasn't there.
Q: What kind of gun did you have?
A: I had a .22.
Q: Did you have a .25 automatic?
A: No, sir.
Q: Okay. You went to get your gun, but you didn't get it. Is that correct?
A: I didn't go to get my gun.
Q: You just went to get a gun?
A: Yes, sir.
Q: And the purpose, as you stated, that you went to get a gun, so you and Robert Farr could do some robberies, some armed robberies. Is that correct?
A: No, sir.
Q: What did you go get the gun for?
A: For him to do one.
Q: You were going to let him do them. You weren't going to do any with him?

A: No, sir.
Q: You were going to supply him your gun so he could do armed robberies?
A: No, not supply him my gun. A gun.
Q: In other words you didn't care if it was yours or whose, but you were going to be the man who got the [2396] gun to do armed robberies. Is that correct?
A: He was going to do it.
Q: I understand, but you were going to supply him the means and possible death weapon in an armed robbery case. Is that correct?
A: Yes.
Q: No further questions.

MR. COOKSEY: That's all I have.

THE COURT: You may step down.

MR. COOKSEY: Mrs. Banks.

MRS. DELMA BANKS, SR.

a witness called on behalf of the Defendant, upon being first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, thereafter testified upon her oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. COOKSEY:

Q: State your name, please.

[2397] A: Alleen Banks.
Q: Mrs. Banks, you are married to Delma Banks, Sr.?
A: Right.
Q: And you and Mr. Banks have six children?
A: Right.
Q: Delma Banks, Jr., is your oldest son, isn't he?
A: Right.
Q: Do you work outside the home, Mrs. Banks?
A: Yes, sir.

Q: And where are you employed?
A: Red River.
Q: Are you under medication?
A: No, sir.
Q: Okay. You work at Red River?
A: Yes, sir.
Q: And how long have you worked at Red River, Mrs. Banks?
A: Fifteen years.
Q: And, Mrs. Banks, you understand this jury has found your son guilty of capital murder, don't you?
A: I understand they have.
Q: You understand that there are only two punishments that can result from this, don't you? [2398]
A: I understand that.
Q: One life, and one death.
A: What will it profit them to kill an innocent person and let the guilty one go free?
Q: Mrs. Banks, are you asking this jury to spare your son's life?
A: I'm asking them to spare my son's life. They got any heart at all. I don't condone nothing wrong. I tried to raise my children up; my son is a good boy and he didn't do this. You don't have enough evidence to prove it, and so what are you gaining?
Q: Mrs. Banks, that's not . . .
A: Can you rest at night, knowing what you're doing?

THE COURT: Mrs. Banks, you are to answer only the questions that the attorney asks you.

A: I'm sorry, Your Honor.

THE COURT: All right.

Q: How long have you and Mr. Banks been married?
A: Twenty-four years.
Q: And how old is your youngest child?
A: Seven.

Q: Mrs. Banks, the issue before this jury now is the sentence to be imposed. You understand that?
[2399] A: Yes, sir, I understand.
Q: Do you think that up until this time Delma, Jr. has not caused any problems, has he?
A: Ye has not. He's a good boy.
Q: Mrs. Banks, he went to school and he worked, didn't he?
A: Right.
Q: And do you think that if Delma is allowed to live, that someday he will be a good member of our community?
A: I know he will; no doubt about it.
Q: Thank you, Mrs. Banks.
A: Give him a chance, please.
Q: Thank you. Pass the witness.

MR. RAFFAELLI: No questions.

THE COURT: You may step down; thank you, ma'am.

A: God bless each of you all. I love you . . .

THE COURT: Thank you, ma'am.

A: . . . and God loves you.

MR. ELLIOTT: Your Honor . . .

THE COURT: I'm going to ask you, Mrs. Banks, not to make any statement except in reply to the questions asked you.

A: I'm sorry, Your Honor.

[2401] * * * *

MR. RAFFAELLI: Ladies and gentlemen of the jury, first of all I want to thank you for your verdict. I think your verdict of capital murder was the only true verdict that could have been handed down in this case, and it was the only proper verdict. It has been a long time for some of you, but this trial is not over and this will be your last opportunity to deliberate

before this trial is completed. I'll be truthful with you. A minute ago, possibly yesterday, I noticed sympathy for the mother, father, the family—for both parents, and I can understand that. But the Court's charge instructs you that you shall answer these questions solely and strictly from the evidence that you have heard during the course of this trial. I want to briefly touch with you the evidence that you heard during the second phase. I want to assure you and remind you that you can consider all the entire evidence that you have heard throughout the entire trial, and not just the second phase. We saw Vetrano Jefferson, and he comes in and says on April 7th, he received a scar that I think all of you could see from where you were sitting, on his left cheekbone. He received that scar at the hands of Delma Banks from a pistol-whipping. He further states that when he left the house, that Delma Banks threatened to kill him, and that his sister had to come in and [2402] break it up. Delma Banks admits that, unquestionably. We heard from Robert Farr, and you have seen him testify throughout this trial. He has admitted to you that he used dope, that he shot. You know, he has been open and honest with you in every way, but he has shown proof and the proof has been corroberated by Delma Banks, is that they went to Dallas and the proof showed you that they got a gun, a .22 caliber pistol, from Charles Cook; and you hear Robert Farr say, as we drove away, he said, "Load the pistol." Said, "We're going to do some armed robberies on the way back to Texarkana," and he said, you know, what happened. They have only got one pistol and there's three of them. They have got one pistol, and I would be concerned if I was in an armed robbery and I didn't have a weapon, and he said, "Man, you know, what is there's trouble?" And he says, "Don't worry about it. I'll take care of it." I think that speaks for itself, and I think you know what that means. We're all reasonable people. Unquestionably.

You have heard Delma Banks admit going to Dallas, Texas, to get a gun. You have heard testimony that that was his gun. He came back to the car and stated in front of Marcus Jefferson and Robert Farr, that, "They didn't have my gun, but they gave me this gun." Why would somebody go to get somebody's gun to do murder, or to do robbery? Doesn't make sense, and I think you realize that.

Now we have heard from several witnesses on reputation, [2403] and they have all said Delma Banks has a good family, fine parents, but his parents are not on trial. His parents didn't do anything wrong. His parents didn't leave that young man, that sixteen year old boy, laying out on the ground, dead. Delma Banks did, and that's who we're here to try, today.

We have heard from James Kelley. He is a friend of the family. He adds nothing; he wasn't there; he doesn't know the circumstances. Delma Banks says no one wants to die. Well, I submit to you that Richard Wayne Whitehead was a sixteen year old boy in the prime of life, that was left laying on the ground in a park at Nash, Texas, dead. He didn't want to die. He had done nothing wrong.

Delma Banks says, "I'll stay away from bad company." Richard Wayne Whitehead was not bad company. He was a young boy in the prime of life, helped somebody out. Helped somebody that he used to work with, to give them a lift home. He wasn't bad company.

Delma Banks says yes, I whipped Robert Farr, and I whipped him with a gun, and I threatened to kill him. He says yes, we went to Dallas, Texas, and we went there to get a pistol. He says, "I thought I would give it to them so they could do the robberies." I don't believe you believe that.

Now the Court Charge talks to you about two questions or three questions. I believe when you took an oath [2404] you said you would render a verdict according to the law and the

evidence, a true verdict, so help you God. You did that yesterday, and I believe you would do it again today. I think we told you in Voir Dire that a jury in the state of Texas does not assess punishment. You will answer questions, and you answer those questions from the law and the evidence you have heard.

If you will recall, I asked you would you listen to the facts and let the facts dictate to you what the answers to the questions should be, and let the chips fall where they may. Each of you said you would, and I believe you will. I further asked you and if the proper answer is yes, will you answer yes, knowing that the defendant would get the death penalty. Each of you answered yes. I believe you will. There is no question in my mind these questions deserve to be answered yes.

In order that we might go over them briefly, let's just touch on them. Question number one says do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Delma Banks, Jr., that caused the death of Richard Wayne Whitehead, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. I think the answer to that is yes when you returned a verdict of guilty of capital murder. If there is a question in your mind was it deliberate, look at the shot [2405] between the eyes, on the bridge of the nose. You have heard the experts say twelve, eighteen inches, whatever their testimony was, no more than two foot, closer to eighteen inches. Gunpowder wounds. Unquestionably deliberate. Intentional. I think the answer to that question should be yes. I think it has been answered yes already. Question three, and I'll skip question two for the present time, says do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Delma Banks, Jr., that caused the death of Richard Wayne Whitehead, was committed deliberately or with the reasonable expectation that the death of the deceased

or another would result. I think that you have answered that question yes.

* * * *

MR. RAFFAELLI: Ladies and gentlemen of the jury, as I was stating, question number three, and I will read it to you, says, "Do you find from the evidence beyond a reasonable doubt that if raised by the evidence, the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?" I submit to you that the answer to that question is yes. There was no evidence—none—on provocation. The answer to question number three should be yes. As I have previously stated, question number one, I think when you [2412] returned your verdict of capital murder, and that's the only true verdict I think could have been returned in this case according to the law and the evidence, and that is that the act was committed deliberately. That question, I think, you have already answered in your mind, and that should be yes, also. Question number two states, "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Delma Banks, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?" I submit to you the answer to that question is yes.

Take the testimony of Robert Farr. They went to Dallas to get the pistol. Delma Banks' pistol. Do harm? Robbery? Delma Banks said he was going to get the pistol to do armed robbery. I think you realize that a man doesn't travel two hundred miles, or whatever the distance is from here to Dallas, Texas, to supply a person with a weapon. Why? I think you know that Delma Banks went to get his gun. That gun has been identified as his. You have heard two family members state that when he returned he said something to the effect—and I'm not trying to quite the evidence. You heard that from the witness stand, but something to the effect that, "I didn't get my gun, but I got another one. Somebody had

my gun." And you heard Robert Farr tell him, as he drove away, to load it, and that, "I'll take care of it." I submit [2413] to you beyond a reasonable doubt that the State has again met its burden of proof, and that the answer to question number two should also be yes.

As I previously told you, according to the Court's charge, you shall answer these questions solely and strictly from the evidence that you have heard during the course of the trial, solely and strictly from evidence. All the evidence that you have heard during both phases of the trial, both guilt and innocence phase and the punishment phase. You, each of you, told me that you would listen to the facts, and that you would let the facts dictate to you what the answers to the questions should be. I submit to you that if you listen to the facts and judge this case from the law as has been given to you by the Court and the facts that you had received, that you will answer each question yes. Thank you.

THE COURT: Mr. Cooksey?

MR. COOKSEY: Ladies and gentlemen of the jury, it has been really a long week, now. Ladies and gentlemen, we accept your verdict. I may have made some tactical errors throughout the trial. I may have offended somebody. If I made any errors, I apologize to you; and if I have offended you, I likewise apologize. Ladies and gentlemen, for a lawyer to stand before twelve fellow citizens of Bowie County and plead for a man's life is an awsome responsibility. I am pleading for Delma's life. I submit to [2414] you that on the evidence, Delma did a terrible thing. I submit to you he is not but twenty-one years old. I think probably you noticed when Delma got on the stand, he could have lied about some things, but he didn't. Delma's statements to you from that witness stand have been his statements to me from the first day I represented him.

Ladies and gentlemen, as all of you know, all "yes" answers will result in a death penalty. Any "no" answer will result in a mandatory life sentence. The State has the burden of proof on all of these questions. You were qualified as jurors on Doctor James Grigson, the psychiatrist in Dallas. The State did not produce Doctor Grigson to meet their burden of further acts of future criminal violence. The testimony they have that would involve Delma in any future acts of violence is the statement of Robert Farr.

Ladies and gentlemen, I plead with you, please examine Robert Farr's testimony. Please examine what Mr. Owen says about Robert Farr, whom he has known for seven or eight years. Please don't sentence Delma to death because of the sorry company he kept. Granted, these people were no good. Granted, Delma should not have been in their company. Please distinguish between the acts of these other people with their long past criminal record, and Delma. Doctor Grigson is not here, and Doctor Grigson did not testify for you. You're a lot of good folks. Delma was always a good and [2415] respectful kid. One of his school teachers comes and tells you that he was not a disruptive factor in his school. Delma has a good basis in life. He comes from a very fine family. As you have seen throughout this trial, scores of his friends up here. Please don't do this to Delma. Punish him severely: life sentence. My goodness, that's severe punishment, but please, let's not take his life. Thank you.

THE COURT: Mr. Elliott?

MR. ELLIOTT: May it please the Court.

THE COURT: Mr. Elliott.

MR. ELLIOTT: Mr. Cooksey.

MR. COOKSEY: Mr. Elliott.

MR. ELLIOTT: Ladies and gentlemen of the jury, if you would, please, take a moment. I have but ten minutes before

you. Please use part of that time to draw a deep breath, collect yourself, compose your thoughts, and try to put into perspective what our purpose is here. In fact, what the purpose of all criminal law is. It is to suppress crime, prevent crime, and punish crime. It is, quite simply, to prevent harm to us all. That's what this phase of the hearing is about. That, and nothing else. It is your part in our system to help protect our nation and our society. Your oath that you would a true verdict render according to the law and evidence applies to your duty as a [2416] fact-finding body. You sentence no one to death. You will not write "death" on a piece of paper, and you will not say "death." You will find the answers to questions based upon evidence, and that's what your purpose is here. That, and that alone.

I will not go through the questions. You will have them in the charge. I would simply say to you that based upon the evidence that you have seen presented here in court, the only reasonable and the only possible answer to those questions that could be in accordance with reason and good judgment is "yes." The only reasonable answer to those questions is "yes."

The testimony of Vetrano Jefferson and Robert Farr is of the utmost significance. Vetrano brought before you the scar on his face, put there by Delma Banks. Vetrano is part of Delma's family. He was pistol-whipped. He was threatened with a pistol. He also corroberates or supports the testimony of Robert Farr. You don't have to believe just Robert in order to find that Delma went to Dallas to get a pistol so that somebody could do some robberies. Marcus Jefferson told you that, too. Marcus Jefferson told you that, too. I think it is worth noting, Marcus is family. Richard Whitehead was a stranger. Delma is a danger to friends and strangers, alike. It doesn't make any difference whether he knows you or not. With regard to the robberies that were [2417] going to be committed coming back to Texarkana, we'll take care of

them. And what if there is any difficulty? We'll take care of them.

I listened very closely to Mr. Cooksey's defense argument. Throughout it I was haunted by an idea that was present in this courtroom, and it is simply this. Evil people do exist. Delma Banks is evil. You don't blow somebody away like Richard Wayne Whitehead, and then execute them, if you're a good boy, you come from a fine family, you've been to church. What accounts for the ability to slaughter a human being like that, except for the quality of evil? And let me tell you something. We're not protected. Our laws give us the opportunity to protect ourselves, but no helping hand comes down from heaven. All that is necessary for evil to triumph in this world is for good people to do nothing, and we lose.

Mr. Cooksey refers to the absence of Doctor Grigson. You don't need a psychiatrist to tell you that with regard to question number two, the answer should be yes. With regard to criminal acts of violence that would constitute a continuing threat to society, you don't need a doctor to come into this place and to tell you the pistol-whipping, the threatening with a pistol of Vetrano Jefferson, the murder of Richard Wayne Whitehead, and then the planning and acquisition of a gun to commit robbery, you don't need anybody to tell [2418] you that there is a probability that this will continue. You have violence before the fact, you have violence during the fact, and you have planned violence after the fact. That question has only one answer, and it is yes.

With regard to the people we saw here, Mr. and Mrs. Banks, the father and the mother, the mother says there is not enough evidence, and the father says he was in a little trouble and he ran with the wrong bunch. And ladies and gentlemen, we wouldn't quarrel with these people. There is just one comment that can be made about these people, and that is the quality of love that parents have for a son is not strained, even though that son may be one Delma Banks.

THE COURT: You have four minutes.

MR. ELLIOTT: Thank you, Your Honor. The Reverend Ford, Reverend Gallutte, Reverend Lewis, men of God, men who testified Delma was good. But you know what? They don't know the other side of Delma the way you know Delma. They didn't see the other half of his soul, the way you saw it revealed in this courtroom. Mr. McGill, the teacher, he never gave me any trouble, but he didn't know Delma, either, did he? He didn't know Delma after school was out and I would submit to you that in that lonesome Godforsaken place in Nash, Texas, in the early morning hours of April 12th, school was out. School was out, and life ended for Richard Wayne Whitehead for the hell of it.

[2419] That's why that boy died. That's why his parents suffered. That's why you're here: for the hell of it.

James Kelley knows nothing about the murder, knows nothing about Delma Banks' whereabouts or actions on that night. Gary Owen, wishing to please his future employers, absolutely no significance whatsoever to what the man said. He heard, he believes, he thinks, but he doesn't know.

Sylvester Hill does not know. And last, I ask you to consider the evidence of Delma Banks. Not one tear until he started talking about his own life. Nobody asked Richard if he wanted to die. Nobody asked the question. I want to live. So do the rest of us, ladies and gentlemen.

As you sit here, this is probably the most terrible position you will ever find yourself in, in your life, because you possess a Godlike power. You will say life, or by your answers you will so indicate that the Judge must say death, but you're not God. You're a jury, and this is not an unholy function. We live in two worlds. Render unto Caesar what is Caesar's and unto God what is His. Christ spoke those words in answer to the question do we pay taxes to pagan temples, and then Christ said render unto Caesar—He recognized that

there was a law of this earth that must guide our actions. And when He said render unto God, He recognized that there is a spiritual world, too; and the two, even though they may be in conflict, must exist together. That is the [2420] problem of life. This is not a question of revenge. This is not a question of vengence. You can not forgive Delma Banks. It is not within your power to forgive Delma Banks.

THE COURT: Your time is up.

MR. ELLIOTT: Thank you, Your Honor. The stain is on his soul forever.

MR. COOKSEY: Your Honor, I would object . . .

MR. ELLIOTT: . . . and all we would ask . . .

MR. COOKSEY: . . . to counsel continuing after you say his time is up.

MR. ELLIOTT: All we would ask is what we sought from the beginning. Simple justice. Thank you.

THE COURT: The objection is overruled. Ladies and gentlemen, at this time you will go with the bailiff and you will take the charge on punishment, and you will commence your deliberations. But before you go, now I'm going to ask that the courtroom—I'm going to allow you to go back down there to the county courtroom. Is that where y' all would like to go back to deliberate? Keep your seats just a minute. You may discharge all of the witnesses down there and clear the courtroom down there, and let the Court know whenever it's clear.

IN THE 102ND DISTRICT COURT OF
BOWIE COUNTY, TEXAS AND IN THE
COURT OF CRIMINAL APPEALS,
AUSTIN, TEXAS

[Filed Jan 13, 1992]

No. 80F86

EX PARTE
DELMA BANKS, JR.

APPLICATION FOR POST-CONVICTION
WRIT OF HABEAS CORPUS

Mr. Banks is scheduled to be executed
WEDNESDAY, JANUARY 15, 1992
at just past midnight

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, DELMA BANKS, JR., by and through his attorney of record, CLIFTON L. HOLMES, pursuant to Art. 1 Tex. Code Crim. Proc., and petitions this Court to issue a writ of habeas corpus, on the grounds that his restraint is founded on an unconstitutional judgment of conviction and sentence of death, entered in violation of the Constitution and laws of the State of Texas and the Constitution of the United States. In support of which, Mr. Banks states as follows:

I. PRIOR PROCEEDINGS

Delma Banks, Jr., a thirty-three year old African-American man, is an indigent prisoner on Death Row in Huntsville, Texas. The state official responsible for confining Mr. Banks

and putting him to death is James A. Collins, Director of the Texas Dept. of Criminal Justice, Institutional Division.

Mr. Banks was convicted of capital murder in the 102nd District Court of Bowie County, Texas, on September 30, 1980, and was assessed the death penalty on October 1 Exhibit A. His conviction and sentence were affirmed on direct appeal to the Texas Court of Criminal Appeals. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1983). The Supreme Court denied *certiorari*. *Banks v. Texas*, 464 U.S. 904 (1983). Mr. Banks' initial application for postconviction relief under Tex. Code Crim. Proc. Art. 11.07 was denied in an unpublished order dated February 29, 1984. *See Ex Parte Banks*, 769 S.W.2d.539, 540. (Tex. Crim. App. 1989). His second application for postconviction relief was denied in a published opinion after rehearing. *Ex Parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989). By order of December 10, 1991, the trial court set Mr. Banks' execution for January 15, 1992. This action followed.

II. CLAIMS FOR RELIEF

THE STATE FAILED TO REVEAL SECRET AGREEMENTS WITH ITS KEY WITNESS.

1. The case against Delma Banks, Jr., turned on the pivotal testimony of one witness: prosecution witness Charles "Two-Two" Cook. The direct appeal opinion of the Court of Criminal Appeals compels this conclusion; rejecting a claim that the State's evidence was insufficient to prove Mr. Banks' guilt beyond a reasonable doubt, the Court toted up the inculpatory facts:

> We conclude that the evidence is sufficient to establish that the appellant intentionally caused the death of Whitehead while in the course of committing robbery. In addition to appellant's admission that he killed Whitehead and stole his vehicle the evidence shows that the appellant was the last person seen with the deceased when he was alive. The appellant was seen in the

deceased's automobile in Dallas the following day. The murder weapon belonged to the appellant. The evidence is sufficient to support the jury's verdict.

Banks v. State, 643 S.W.2d 129, 132 (Tex. Crim. App. 1983) (citations omitted). Almost all this evidence—Mr. Banks' alleged extrajudicial "confession," his alleged ownership of the .25 caliber pistol recovered through Cook, and his alleged presence in Dallas, driving Whitehead's car—came before the jury through the testimony of one witness: Charles Cook.

2. What the jury did not know was that Cook was testifying pursuant to a generous "deal" cut with the prosecutors—a deal that would erase charges already pending against Cook, and which would prevent further charges, based on Cook's own involvement in the events surrounding the Whitehead murder, from being pressed. The prosecutors' determined concealment of information critical to the jury's assessment of Cook's credibility denied Mr. Banks his rights under the Sixth and Fourteenth Amendments. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959). Because the State's refusal to reveal its agreements with Cook deprived Mr. Banks of a fundamentally fair trial, this Court must reverse his conviction and sentence.

3. The "deal" Cook made with the State had two parts. First, in return for his testifying against Mr. Banks in a manner favorable to the prosecution, the prosecution agreed not to charge Cook as an accessory to the Whitehead murder. Exhibit D, Affidavit of Patrick DeLaune re Charles Cook. Given that he had acknowledged being in possession of both the murder weapon (over which he had exercised apparent ownership, selling it to a neighbor) and the victim's automobile, the threat from such a charge was real and immediate. In addition, Cook's lengthy prior criminal record made likely that the prosecution would seek to enhance his punishment under Texas' habitual offender statute; as a

result, Cook faced a possible long prison term if he did not testify.

4. Second, in return for Cook's testimony against Mr. Banks, the prosecutors engineered the dismissal of a serious pending charge against him. Cook, at the time a parolee from the Texas prison system, had been charged with arson. Despite the fact that Cook's sister, the victim of the alleged arson, had stated under oath that she did not intend to pursue the charge against Cook, State authorities refused to release him. Exhibit E, Dallas Court Records of Charles Cook. Indeed, far from relenting, the prosecutors turned up the heat by enhancing the charges to allege that Cook was a habitual offender—exposing him to a possible sentence of life imprisonment. *Id.* Fortunately for Cook, his bravura performance in Texarkana accomplished what his sister's pleas could not; only days after he testified against Mr. Banks in Bowie County, the charges against him in Dallas were dismissed and he walked out of the Dallas County jail a free man. Such a happy coincidence compels the conclusion that the prosecution bargained for Cook's testimony, pledging to dismiss the pending charges against him in return for his cooperation.

5. The prosecution's failure to disclose that Cook stood to profit so enormously by his testimony, narrowly evading a possible life term in prison, requires the reversal of Mr. Banks' conviction and sentence of death. *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Such critical evidence concerning the credibility of a government witness is exculpatory, and must be disclosed. *Giglio, supra.* This impeachment evidence is "favorable to an accused," *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and must be delivered to the defense upon request because "(t)he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible

interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

6. It cannot be disputed that the testimony of Charles "Two-Two" Cook was the focus of the State's case at the guilt phase of Mr. Banks' trial, as is evident from the amount of time devoted to it in the closing arguments of both sides. *See* S.F. Vol. VIII at 2272-2276, 2281-2291, 2294, 2297-3000. Likewise, Cook's credibility was as critically important as the content of his testimony; if the jury believed him, they would probably convict Mr. Banks. Further, if they convicted Mr. Banks, they would probably return an affirmative answer to the second special issue, because of Cook's damning allegation that Mr. Banks bragged of having killed Whitehead "for the hell of it." As a result, the prosecutors' actions in concealing from the jury Cook's enormous incentive to testify in a manner favorable to the State require that this Court reverse Mr. Banks' conviction and sentence.

* * * *

COUNSEL FAILED TO PROVIDE MR. BANKS EFFECTIVE ASSISTANCE THROUGHOUT ALL STAGES OF THE PRE-TRIAL, VOIR DIRE, AND TRIAL PROCEEDINGS.

15. By any standard, counsel for Delma Banks, Jr. fell below the expected range of conduct for minimally competent attorneys. As a result of counsel's manifold errors and omissions, Mr. Banks was convicted of capital murder and sentenced to death, and now faces execution.

16. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to counsel, a right fundamental to our criminal justice system. Our adversarial system presumes that counsel will act as advocate for the accused. *Anders v. California*, 386 U.S. 738 (1967). To that end, the Supreme Court has repeatedly

emphasized the "fundamental" role of counsel to a fair trial. *See, e.g., United States v. Cronic*, 466 U.S. 648 (1984); *Argersinger v. Hamlin*, 407 U.S. 24, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Counsel is the means through which the defendant's rights are secured. *Cronic*, 466 U.S. at 653; *see also United States v. Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). Without competent counsel, the trial loses its character as a fairly matched battle between adversaries; truth is the first casualty. *Cronic, supra.*

17. In *Strickland v. Washington*, 466 U.S. 688 (1984), the Supreme Court held that counsel was constitutionally ineffective if his conduct so undermined the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result. *Id.* at 685. The inquiry is twofold: whether counsel's performance was in fact deficient; and, if so, whether the defendant was prejudiced as a result. *Id.* at 668.

18. To make the first determination, the proper inquiry is whether counsel's conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 694. To satisfy the prejudice requirement, the proper inquiry is whether there exists a reasonable probability that, were it not for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

19. The failings and errors of counsel in this case were extraordinary. By any legal standard, the performance of Mr. Banks' counsel fell far below the minimum standards expected of reasonably competent attorneys, and Mr. Banks was actually prejudiced as a result. Certainly, given the hapless efforts to defend Mr. Banks at the sentencing phase of the trial, the totality of the representation of the accused warrants a new trial. Furthermore, had adequate representation been provided, Mr. Banks would not have been convicted of

capital murder and he certainly would not have been sentenced to death.[2]

20. Many of the grounds for relief set forth in this petition were not objected to at trial or raised on appeal. To the extent this Court finds that counsel's failure to object at trial to any of these errors or raise these issues on appeal is a procedural bar, petitioner submits that counsel was constitutionally ineffective for failing to preserve these issues. Furthermore, trial counsel was also ineffective in affirmative respects discussed in detail below.

21. It is important to note in reviewing these claims that defense counsel, Lynn Cooksey, was not an inexperienced trial lawyer. He had been employed by the Bowie County District Attorney's office for ten years, from 1969 through 1978. He was the duly elected district attorney for the last eight of those years. After Cooksey left that office, he defended several clients in criminal cases before taking on Mr. Banks' case in the spring of 1980. (Exhibits H, I). By all accounts, including his own, Mr. Cooksey was a seasoned, highly successful criminal lawyer.[3] Delma Banks, Sr., and his wife Ellean sought Cooksey out to defend their son's life because they had been told he was the best defense lawyer in Texarkana. (Affidavit of Delma Banks, Sr., Exhibit C).

22. Mr. and Mrs. Banks did not have the means to pay in advance the entire $10,000 fee demanded by Mr. Cooksey, but they managed to scrape together $1,000 as a down

[2] Indeed, counsel's failings and errors in this case were sufficiently egregious to constitute a complete breakdown in the integrity of the adversarial process. *United States v. Cronic*, 466 U.S. 648 (1984). For this additional reason, no showing of prejudice is required.

[3] In 1978, Mr. Cooksey claimed in an interview with *Time* magazine that he had a record of 3,500 criminal convictions and only five acquittals in nine years as a district attorney. He bragged, "I've got the best prosecution record in the state of Texas." "Keystone Kops," *Time*, March 27, 1978, at 84. (A copy of the article is attached as Exhibit J.)

payment. They also had to come up with another $1,500 at the insistence of Mr. Cooksey, to hire Dennis waters, a private investigator with whom Mr. Cooksey often worked, to assist in the defense. Making these payments exhausted the Banks' financial resources, but gave Mr. Cooksey vital resources of money and investigative aid to use in preparing his defense of Delma Banks, Jr. (Exhibit C). Unfortunately, those resources were squandered.

A. Counsel failed to investigate matters relevant to both guilt/innocence and punishment phases of the trial.

23. Though he was retained soon after Delma Banks, Jr. was arrested, Mr. Cooksey failed to use the months before trial to do some basic investigation. At trial he argued strenuously against the admission of pictures of the park where the deceased was found, saying he was surprised because he had never seen the pictures and could not effectively cross-examine the witness about them. One of the reasons he was surprised was that he had never visited the park and did not know what the area looked like. (S.F. Vol. VIII 2003-4). The park was hardly in some remote province; it lay less than five miles from Cooksey's own desk.

24. There is also nothing in the record to indicate that Mr. Cooksey or Mr. Waters checked into the autopsy report's finding that the date and time of death were April 14, 1980 at 10:15 a.m., more than *two days* after the State's proposed time of death. (Autopsy report, Exhibit R). Though that precise time may have been the time at which the body of Mr. Whitehead was discovered, the time at which the autopsy was performed, or even the time at which the report was dictated, the medical examiner did not testify as to a date or time of death. Indeed, the condition of Mr. Whitehead's body at the time of the autopsy was such that death could easily have occurred as recently as 24 hours before the body was found. The only evidence the State presented regarding the time of death was the testimony of Mike Fisher that he heard two

sounds that sounded like gunshots at 4:00 a.m. on April 12, 1980 and that he was at a house near the park where the deceased was ultimately found when he heard those sounds. (S.F. Vol. VIII 1988-91). He did not say whether they came from the park or how close they sounded to his location. He did not say whether they sounded like pistol or rifle shots.

25. The State's thin veneer of "proof" of the time of death was allowed to stand because Mr. Cooksey cross-examined neither the medical examiner nor Mr. Fisher in any way that would break through to the emptiness of the State's evidence. Mr. Cooksey also did not argue in closing at the guilt/innocence stage that there should be any doubt as to the time of death. There could have been no reasonable tactical or strategic reason for failing to investigate, explore through cross-examination, or highlight in closing argument the disparity in the date of death and the allegations of the State. If Mr. Whitehead suffered his wounds anytime after 6:00 a.m. on April 12, 1980 in Texarkana, Delma Banks could not have been the person who shot him, if Charles Cook's testimony that he first saw Mr. Banks in Dallas at 8:00 a.m. on April 12, 1980 is to be believed. (S.F. Vol. VIII 2117).

26. Neither Mr. Cooksey nor Mr. Waters did anything to investigate the mental condition of their client. They did not arrange for his evaluation by a mental health professional, despite the fact that Mr. Cooksey had to slowly and carefully, and often repeatedly, explain various preliminary stages of the court proceedings to Mr. Banks. This lack of understanding on the part of Mr. Banks continued to manifest itself throughout the trial in his conversations with his lawyer and the Court. Had Mr. Cooksey made a reasonable effort to discover the reason for this, he would have found that Mr. Banks suffered from a number of problems which could have had a tremendous impact on issues at both stages of the trial.

27. A recent psychological evaluation of Mr. Banks revealed a full scale IQ of 85, which is his "best functioning"

range. Stressful conditions deteriorate his ability to intellectually deal to a given situation, especially when the situation mainly involves listening and responding verbally. He suffers from gross deficiencies in long term memory and a diffuse neurological disorder. He also has considerable trouble in spelling, reading and comprehending what he is reading. The evaluation found Mr. Banks severely impaired in long-term verbal memory and noted a significantly diminished capacity to communicate verbally and understand what is being said to him verbally. These problems are associated with brain damage. (Affidavit of Patrick DeLaune re Gregorio Pina, III, PH.D, Exhibit K).

28. Because of these organic, permanent neurological problems, Mr. Banks has had to follow the lead of others to function in the world. He masks his deficits by nods, smiles, and saying things that indicate agreement with whoever is speaking to him. These actions on his part lead others to believe that he is comprehending what is happening in a given situation when that is not really true. This compensation for his brain damage is a common adaptation by people with problems similar to those of Mr. Banks. (Exhibit K).

29. The trial and the proceedings leading to it presented Mr. Banks with an enormously stressful situation, which would have decreased his ordinarily low intellectual functioning. At those proceedings, it is likely that Mr. Banks resorted to a pattern he had long used to survive in the world: compliance with authority. To determine what people in authority, such as his lawyer, or the judge, wanted, he likely used visual cues, such as facial expressions and even verbal intonations, as a primary basis for many of his decisions and responses to trial situations. Mr. Banks' personality, compounded by his organic brain damage, render his comprehension of the stressful trial situation highly questionable. Specifically, his dysfunctions and personality likely combined to prevent him from understanding many of the

questions asked of him by Mr. Cooksey and the Court. Mr. Banks would not say as much, however, because of his difficulty in communicating verbally and because of his long pattern of masking his disabilities by going along with what he thinks people want to hear.

30. Obviously, Mr. Banks brain damage and low mental functioning are impediments to effective communication with legal counsel. He is easily confused when talking and trying to understand speech. There is some indication in the trial record that Mr. Cooksey and the Court were aware of some communication problems. At least twice, meetings took place in the Court's chambers with Judge Pesek, Delma Jr., and Mr. Cooksey present. (S.F. Vol. IX 2241-58; 2357-68). At each of those conferences trial counsel and the Court attempted to explain decisions that they wanted Delma Banks to make in the legal arena. He exhibited considerable confusion during those meetings, and always acquiesced in what his lawyer or the Court wanted, when he picked up on indications of specific advice.

31. The record plainly demonstrates Mr. Banks' confusion and misunderstanding. At the second conference, which took place during the punishment phase of trial, Delma told Mr. Cooksey and the trial court that he still did not understand how he could have been convicted when no one had found anything in his possession. (S.F. Vol. IX 2368). Despite his lawyer's explanation, when Delma testified, he again said that he did not understand that the jury had found him guilty. (S.F. Vol. IX 2389).

32. It is evident from their unusual treatment of Delma during the chambers conferences that both Mr. Cooksey and Judge Pesek knew or strongly suspected that Delma suffered from serious mental impairments. That should have raised in Mr. Cooksey's mind a host of issues, such as the possibility that his client might not be competent to stand trial and might have severe problems in understanding legal proceedings and

decisions that might be required of him. Additionally, problems understanding speech and speaking carry obviously significant connotations regarding his alleged admission to Charles Cook and his reaction to questions put to him by various people about the crime. Indeed, his dysfunctions undoubtedly played a part in whatever the situation was that he found himself in on the evening of April 11 and the early morning hours of April 12, 1980.

33. Despite all of this, trial counsel did not ask for an evaluation of his client by any mental health professionals, nor did he seek expert assistance in understanding or describing his client's limitations to the jury. Expert witnesses are critical in many capital cases. Without their assistance, the sentencing jury may be deprived of a mitigating explanation for otherwise unexplainable behavior. Thus in *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988), the court found trial counsel ineffective for failing to investigate a capital defendant's mental condition for the purpose of presenting mitigating evidence in the sentencing phase. Because counsel presented no evidence in mitigation of punishment, despite the fact that a reasonable investigation would have uncovered substantial mitigating mental state evidence, the court granted the petitioner a new sentencing trial. *Id.* at 637; *see also Middleton v. Dugger* 849 F.2d 491 (11th Cir. 1988) (failure to conduct an investigation into petitioner's background, to uncover mitigating, psychiatric, IQ, and childhood information, and to present that information at penalty phase of death penalty case was ineffective assistance of counsel). Similarly, in *Curry v. Zant*, 371 S.E.2d 647 (Ga. 1988), the Georgia Supreme Court held that trial counsel's failure to obtain an independent psychiatric evaluation in a capital case violated the defendant's right to the effective assistance of counsel. *See also Stephens v. Kemp*, 846 F. 2d 642 (11th Cir. 1988) (counsel was ineffective for failing to investigate, present, and argue to the jury at the sentencing phase evidence of defendant's mental history and condition).

34. The only time trial counsel showed any interest in establishing anything about Mr. Banks' mental functioning was when he attempted to establish that his client had no mental disorders, was competent, and not insane. (S.F. Vol. IX 2251-52). The farcical quality of any suggestion that the halting, uncertain, eager-to-please Mr. Banks might somehow self-prove his competency, sanity, and freedom from mental disorders is obvious following Dr. Pina's examination-and should have been obvious to the participants at the time of trial. Defense counsel's and the trial court's findings that Delma was a "bright young man" notwithstanding, (S.F. Vol. IX 2251, 2253), it is inexcusable that Mr. Banks' mental functioning was never investigated by his lawyer.

35. Indeed, the fact that Delma Jr. was called to discuss strategy and tactics with his lawyer in the presence of the court shows an utter lack of respect for the confidentiality of the attorney-client relationship by officers of the court who should have known better. Mr. Banks' right to the effective assistance of counsel surely encompassed the right to private communication without the stressful and inhibiting presence of the trial judge.

36. Even when trial counsel did present evidence, he did not take the time to investigate his own witnesses and what they could say. Mr. Cooksey did nothing to familiarize himself with the testimony of the witnesses he called for his client at the punishment phase of the trial. During a meeting in chambers with Judge Pesek present, Mr. Cooksey admitted that he did not know the people he was calling and examining for the defendant. (S.F. Vol. IX at 2358-2359). He did not even prepare Mr. and Mrs. Banks to testify. (Exhibits B, C). Neither he nor Dennis waters questioned either parent about Delma Jr.'s childhood or health problems. Had they done so they would have discovered a wealth of information that would have cast a far different light on Mr. Banks than the State's grossly distorted picture of a remorseless killer.

37. Life was a struggle for Delma Banks, Jr. from the very beginning. Just a few days after he was born, he developed a bad rash that did not improve with treatment. One doctor after another examined, tested, and treated him. Finally they determined that the fragile baby was hyperallergenic, allergic to almost everything around him. (Affidavit of Ellean Banks, Exhibit B).

38. The doctors told Mrs. Banks that there were many foods that her frail son should not eat. She could not follow their advice because the family lacked money to buy food for the baby different from what the rest of the family ate and she felt it would have been nearly impossible to keep her son from eating what he wanted to eat. Exhibit B.

39. These allergies made Delma Jr.'s life miserable even when he came into indirect contact with things to which he was allergic. Mr. Banks worked at a chicken plant for some time, and Delma, Jr. got terrible rashes if his father even touched or played with him. It did not matter if Mr. Banks took a shower and changed clothes; the rash appeared anyway, an angry, unsightly barrier between father and son. Mr. Banks finally changed jobs to try to reestablish a relationship with his son. Exhibit B.

40. When Delma Jr. was a small child his allergies often made him break out in hives. When that happened, neither he nor his mother slept. She used to put socks on his hands and pin them to his diaper to try to keep him from scratching at his face and arms. Once after she had done that and later checked on him, she found that he had rubbed his face completely raw on the pillow by twisting and turning his head to try to scratch the rash on his face. As she comforted him and saw his bloody pillow, she wondered whether she was somehow to blame for his illness. *Id.*

41. At times the unrelenting allergies even threatened Delma Jr.'s life. When he was three or four years old, he

received a penicillin shot and his face swelled up like a balloon. He survived, but the doctor treating him told Mrs. Banks that if he ever had such a reaction again, it might kill him. *Id.*

42. It is not hard to imagine the devastating effect that Delma's allergies had on his social relations with others. When he was a child, he was always self-conscious about how his arms and legs looked because they were covered with sores caused by his allergies. Other children often teased him. He wanted badly to take part in sports, but did not because he was so ashamed of the sores on his arms and legs that he would not wear clothing such as uniforms that did not have long sleeves and long pants. He even wore long-sleeved shirts in the middle of summer so that people would not see his sores. Desperate for friends, he became a follower of others and often took the blame for things other people did. *Id.*

43. As traumatic as his allergies were, they were not the only burden Delma Jr. bore during his childhood. His father had a severe drinking problem which nearly tore the family apart. He would got drunk frequently, then yelled and screamed at his wife. Sometimes he hit her. Mrs. Banks and the children were terrified of him and she took the children to various places to run away from the situation. Mr. Banks always apologized and pledged to do better, the family would reunite, then the drunken episodes would happen again. *Id.*

44. Even when Mr. Banks tried to do right by his children, he could be harsh. Once when Delma Jr. was very young and in elementary school, the principal of his school told Mr. Banks that his son was doing something to trick other students out of their lunch money. Mr. Banks promptly tied Delma Jr. to a tree in the yard of their home and whipped him with a leather belt or strap. He told Delma Jr. that he was going to leave him tied to the tree all night, then slipped out of sight. A neighbor who saw what was happening let

Delma Jr. go. No other school problems with Delma Jr. were reported to Mr. Banks following that incident. Exhibit C.

45. While trial counsel's failure to investigate information relevant to the guilt stage of the trial is deplorable, his failure to adequately investigate and present mitigating evidence at the punishment is even more outrageous. Trial counsel in a capital sentencing proceeding must ensure the adversarial process works to produce a just result. *Strickland v. Washington*, 446 U.S. 668 (1984). One of an attorney's principal duties is "to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 668; *see also Darden v. Wainwright*, 478 U.S. 1036 (1986) (counsel not ineffective because he engaged in extensive pre-trial preparation and investigation for the penalty phase of defendant's trial); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989). In a capital case, the investigation, preparation, and presentation of mitigating evidence is in many cases a much more critical task than preparing for the guilt/innocence phase. Guilt is frequently a foregone conclusion.[4] Whether the accused lives or dies, however, is not.

46. As the Supreme Court has recognized, the sentencing body must have before it the fullest information possible concerning the defendant's life and background. *Lockett v.*

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[4] The conclusion is not foregone in this case, however. As will be argued throughout the course of this petition, Mr. Banks case was a flimsy construction of circumstantial "evidence" held together only by the oily paste of Charles Cook's testimony. There is no evidence directly linking Mr. Banks to the crime. The jury never knew, when it evaluated the credibility of Mr. Cook that he had been threatened with two life sentences if he did not testify and that he had to practice his testimony for three days in the courtroom when court was not in session before the State could be sure that he would get it right. (*See* Exhibit D). The jury also did not know at the guilt/innocence stage of the trial that Vetrano Jefferson had told James Kelley that Mr. Banks had not committed the murder. (S.F. Vol. IX at 2550).

Ohio, 438 U.S. 586 (1978); *see also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (sentencer must have before it all possible relevant information about the individual defendant whose fate it must determine). The logic to this Eighth Amendment principle is self-evident. In the capital sentencing proceeding, "the jury is called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" *Turner v. Murray*, 476 U.S. 28 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). It is essential, therefore, that the sentencer consider "those compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The failure to consider mitigating evidence creates the risk the death penalty will be imposed in spite of factors which may call for less severe penalty. *Id.; see also Skipper v. South Carolina*, 476 U.S. 1 (1986) (state's exclusion of evidence regarding adjustment to prison violated Eighth Amendment); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencers' failure to consider evidence of turbulent family history violated Eighth Amendment).

47. It is for this reason that courts have given special attention to capital cases where little or no mitigating evidence is presented in support of a life sentence. *See, e.g., Harris v. Dugger*, 874. F. 2d 756 (11th Cir. 1989); *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989); *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988); *Hyman v. Aiken*, 824 F.2d 1405 (4th Cir. 1987); *King v. Strickland*, 748 F.2d 1462 (11th Cir.), *cert. denied 471 U.S.* 1016 (1984); *Bolder v. Armontrout*, 713 F.Supp 1558 (W.D. Mo. 1989); *Mathis v. Zant*, 704 F. Supp. 1062 (N.D. Ga. 1989); *see also Cook v. Lynaugh*, 821 F.2d 1072 (5th Cir. 1987).

48. In this case, investigation for both stages of trial was woefully inadequate. Despite the availability of a substantial number of sources of mitigating evidence, those sources were used little or not at all. Pretrial investigation, principally

because it provides a basis on which most of the defense case must rest, is perhaps the most critical stage of a lawyer's preparation. *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984). By failing to adequately investigate Mr. Banks' case, Lynn Cooksey robbed himself of the opportunity to evaluate whether his defense at the guilt/innocence stage could be based upon a more substantial theory than failure of the State's proof (which, as any competent defense lawyer knows, is often no "theory" at all). He also robbed his client of the chance to be found not guilty by the jury.

49. Mr. Cooksey tried to make up for his lack of investigation of the guilt/innocence issues by proposing that Mrs. Banks testify that Delma, Jr. could not have committed the crime because he was home with her on the night of the murder. When she said she could not lie to the jury, he grabbed her shoulders and shook her hard, saying, "What kind of mother are you that you won't tell a little white lie to save your own son?" She continued to refuse and Mr. Cooksey, no doubt frustrated, dropped the idea. Exhibit B.

50. First stage matters aside, had the mitigation evidence set forth above been developed and presented, no humane sentencer would have returned a verdict of death. The tragedy that marked Delma Banks' life is outside the realm of normal experience, and had the jury known of it, its view of the state's evidence would without question have been totally different. *See Harris v. Dugger*, 874 F.2d 756, 763. (11th Cir. 1989). Certainly, evaluating the totality of the circumstances, as required under *Ex parte Walker, supra*, counsel's feeble attempt to present a defense at the sentencing phase entitles Mr. Banks to a new trial. The failures of trial counsel here deprived Mr. Banks of his right to effective assistance of counsel and may ultimately cost him his life. For these reasons, this court should issue the writ of habeas corpus on Mr. Banks' behalf and vacate his conviction and sentence of death.

B. Deficiencies In Trial Counsel's Performance in Pretrial Proceedings and Jury Selection.

51. Trial counsel filed few motions and filed most of them on August 15, 1980, close to the time of trial. (Tr. 16-32). Virtually none of those motions were taken up by the court until September 22, 1980, the same day that jury selection started. (Tr. 7). In a turn of events that would be comic if it were not so tragic, one of the motions decided at that time was a discovery motion (Tr. 24). Of course, with the beginning of the trial imminent, any information gained through the motion could not have been used meaningfully to develop or inform defense strategy. Trial counsel simply did not follow up on even his own motion for discovery to try to prepare for this case.

52. Despite considerable pretrial publicity, defense counsel did not request a change of venue motion until Mr. Banks himself pleaded not to be tried in Bowie County because he feared he could not receive a fair trial there. Delma Jr. made this plaintive request on September 22, 1980. The next day, with the bare minimum of support required by statute through affidavits, trial counsel filed the motion. (Tr. 65). A brief "hearing" was held on September 29, 1980, just before the start of the jury trial. (S.F. Vol. VIII at 1912-1932). At that "hearing," two witnesses testified for the State, one of whom was Willie Huff, the chief investigating officer on the case, hardly an unbiased witness. Mr. Cooksey asked very few questions of either witness and even asked Mr. Banks for advice on what questions he should ask. (S.F. Vol. VIII 1919, 1922). At the end of the State's evidence against the venue motion, Mr. Cooksey offered only the testimony of Mr. Banks. Mr. Banks was obviously unprepared to give evidence and could only offer general support for his concerns. (S.F. Vol. VIII at 1924-1931). Mr. Cooksey offered no other evidence, such as newspaper stories or radio and television stories regarding the extent of the publicity. Given this

paultry showing in support of the motion, it is not surprising that the court denied it. In fact the publicity was pervasive and witnesses could have been found who would have testified that it was impossible for the defendant to receive a fair trial in the atmosphere that prevailed. (Affidavit of Clyde Lee, Exhibit G).

53. Several times during voir dire, trial counsel told prospective jurors that if the defendant testified at a criminal trial, he waived the ability to challenge the sufficiency of the evidence to support the conviction if he was convicted. That was simply an incorrect statement of the law. In fact, the law at that time was that if a defendant moved for a directed acquittal, at the close of the State's case, then testified, he waived the right to challenge the court's denial of the motion. It was also true that if a defendant testified at the second phase of his trial that he had committed the crime, he could not then challenge the sufficiency of the evidence.

54. While the jury's understanding of that statement may not have been critical to the case, Mr. Cooksey's misunderstanding of the law was critical to the advice he likely gave to Mr. Banks about not testifying. Mr. Banks, who testified at the punishment phase of his trial, offered a credible explanation for his actions when asked and said that he had not committed the murder. Such information would have certainly been highly relevant and quite significant for the jury to have when evaluating his guilt. The only reasonable explanation for Mr. Banks not testifying is that his attorney tragically misunderstood the law and, through an interaction of counsel's advice and Mr. Banks' mental dysfunctions, deprived Mr. Banks of his opportunity to tell the jury what happened. Such an error, with such dire consequences, cannot be harmless and must be corrected by this Court.

C. Deficient Trial Performance

55. During the trial, Mr. Cooksey's cross-examination of key State's witnesses was painfully inadequate. As previously noted, he did not pursue the time and date of death with the medical examiner, though they varied significantly from that claimed by the State and could have absolved Mr. Banks of guilt in the case. Trial counsel did not question Mike Fisher closely about the purported gunshots he heard in the early morning hours of April 12, 1980, which were the only evidence used by the State to establish time of death. Charles Cook's version of Mr. Banks' confession to killing the deceased varied from the facts in significant respects that were never brought out by defense counsel. Cook's version has Mr. Banks shooting Mr. Whitehead four times and running over his legs with a car. (S.F. Vol. VIII at 2127). The autopsy report shows that the victim was shot only three times and was not run over by a car. (Exhibit R). Cook identified the gun shown to him by the State while testifying as the gun he received from Mr. Banks, but had no way of doing that. There was no testimony that he had marked the gun or that it was in any way extraordinary. Defense counsel did not cross-examine him about it.

56. Defense counsel did little or nothing to challenge parts of Cook's story ripe for cross-examination. Cook never explained the incongruous situation of him allowing a person he knew had confessed to murder to stay in his family's home. He did not explain why he took it on himself to get rid of the car or to sell the only gun that Mr. Banks had with him. All of these actions point to Mr. Cook being far more than the innocent bystander to events that he claimed to be. Nonetheless, Mr. Cooksey allowed this testimony to stand unchallenged by serious cross-examination.

57. Mr. Cooksey's performance was no better regarding other witnesses. He did not test the stories of any of the people in the Cook household about the events of the week-

end when they said they were joined by Delma Banks. He allowed Bennie Lee Jones to identify the murder weapon without saying how he could do so. He did not question Mr. Jones about why Mr. Cook had sold him the gun. Carol initially said the car Mr. Banks was in was a red Mustang, then corrected herself to say it was a green Mustang. (S.F. Vol. IX at 2187). Again there was no cross-examination. State witnesses regarding ballistics and fingerprinting were not cross-examined to any degree. Mr. Cooksey allowed the State through its witnesses testifying about the wound to the bridge of the nose of the deceased to give the jury the impression that the shot was "right between the eyes" and penetrated the skull. In fact, that shot traveled essentially *down* through the face, exiting from the lower cheek of the deceased without doing any damage to his brain—the path of the bullet was not front to back, but top to bottom in essentially a vertical plane. (S.F. Vol. IX at 2217; *see also* Exhibit R). Despite the availability of these facts, Cooksey allowed the prosecutors repeatedly to insinuate through questions, and to argue to the jury, that the same wound was from a shot fired at a 90-degree angle into the plane of the face.

58. After carefully examining his client in the judge's chambers regarding his understanding of his right not to testify, Mr. Cooksey then emphasized that failure to the jury by announcing in open court that the defendant was not testifying on counsel's advice. (S.F. Vol. IX at 2259). The effect of this was extremely prejudicial because it could well have indicated to a reasonable juror that Mr. Cooksey did not believe Delma to be innocent.

59. The defense rested at the first stage of the trial without producing any evidence at all. There was much that could have been offered. Demetra Jefferson could have testified that the reason Delma went to Dallas was to look for a place for them to live. He and Demetra were living together at the time with their four children. She also knew that Robert Farr

illegally obtained prescription drugs and served as a snitch for law enforcement agencies. Finally she could have testified that sometime between April 11, 1980 and April 24, 1980, Deputy Sheriff Willie Huff came to her mother's house and took her brother Vetrano Jefferson away with him. He took Vetrano to the Little Brown Jug in Texarkana and offered to give Vetrano a gun so that he could "blow Delma's head off." He further promised that if Vetrano did that, he would make sure nothing would happen to Vetrano. Vetrano declined Huff's offer. Mr. Cooksey should have been aware of this information, as Ms. Jefferson had previously given it to Dennis Waters during an interview with him. (Affidavit of Rob Owen re Demetra Jefferson, Appendix M).

60. Demetra Jefferson's information would have been useful to offer an alternative explanation for Delma's trip to Dallas on April 12 or 13. It also could have provided cross-examination material with which to challenge the credibility of Vetrano Jefferson, Robert Farr, and Willie Huff. Farr's credibility would have been further weakened had James Kelley and Gary Owen, who testified at the punishment phase about Farr's drug use, his trying to illegally obtain prescription drugs, his use by law enforcement as a snitch and Farr's lack of reliability in that role, been called to testify at the guilt stage. Given the key role Farr played in the case concerning the gun, there would have been no strategic or tactical reason for holding those witnesses until the punishment phase. Of course, Kelley's testimony at the punishment phase that Farr had told him Mr. Banks did not commit the murder could also have been very useful as cross-examination material. (S.F. Vol. IX at 2373).

61. Even someone as easy to locate as a competent auto mechanic could have added significantly to the defense of Mr. Banks: The problem with Mr. Whitehead's car that was described by Patricia Hicks and Patty Bungardt undoubtedly was an electrical problem with the battery or alternator.

Regardless of which it was, there is no way that the car could have been driven from Texarkana to Dallas without stopping several times alongside the road, an unlikely scenario, or a significant amount of electrical work being done to the car. (Affidavit of _____ Appendix _____). There is no evidence of the latter having been done between the time Mr. Whitehead was last seen and the time Charles Cook reported seeing the Mustang in Dallas. He also said in a statement he gave to police that he drove the car around a lot. *He described no electrical problems.* At a minimum, evidence from an auto mechanic regarding the electrical problem would have given Mr. Cooksey more ammunition with which to cross-examine Charles Cook, and may well have indicated that the Mustang never arrived in Dallas at all.

62. The same inexplicable failure of defense counsel to present evidence permeates the punishment phase of the trial. Vetrano Jefferson's fight with Mr. Banks was central to the State's contention that Delma should receive the death penalty. The jury never knew, however, that Mr. Banks hit Vetrano to protect Demetra Jefferson, who was then pregnant with Mr. Banks' twin boys. Vetrano Jefferson had been drinking, began to argue with his sister Demetra, then threatened to hit her. Mr. Banks warned him not to do that and Vetrano replied that he would hit Demetra if he wanted to, even if she was pregnant. When he was about to hit her, Delma pulled a gun from his pocket and hit Vetrano in the face with it. Demetra would also have said, if called to the stand, that Delma never threatened Vetrano's life, as Vetrano testified. (Affidavit of Rob Owen re Demetra Jefferson, Exhibit M).

63. Of course, this account would have created a dramatically different impression of Delma than the jury actually received. There could be no strategic reason for not calling Demetra Jefferson to the stand to explain the entire context of the incident. Mr. Cooksey should have known about this

information because Ms. Jefferson had given it to Dennis Waters. *Id.*

64. As mentioned above, trial counsel did an exceedingly poor job of presenting information through the people who testified on behalf of Mr. Banks at the punishment phase of the trial. His examinations were very brief and did not begin to plumb the depths of the knowledge of Mr. Banks that these people, such as one of his teachers and his employer, should have had. It is incredible that Mr. Cooksey, during a conference in the Court's chambers with Judge Pesek and Delma present, suggested to Delma that the rest of the witnesses ready to testify for Delma should not do so. (S.F. Vol. IX at 2358). Seven of those people remained and Mr. Cooksey demanded the Delma tell him who to call:

> What I want to know is out of these people listed on this yellow sheet that I have just named, who in there, since I don't know these people, I don't know any of these people, I don't know how well they know you and how long they have known you. You know that. You know them a whole lot better than I do. Who on this list do you want me to call?

(S.F. Vol. IX at 2359). With his client's life on the line, trial counsel did not want to let the jury hear all of the people who were prepared to tell the jury that Delma should live—worse, he did not even know what those people could say.

65. The reason he did not know any of these people is that they were only present in court because he had had Mrs. Banks call them, late the night before, after Delma had been convicted, and agree to testify. The people she called agreed to come, but of course there was no way Mr. Cooksey at that late date could have fully investigated the potential of their testimony and used his expertise, such as it was, to determine how it should best be presented. (Exhibit B).

66. Trial counsel's feeble performance continued during closing arguments of the State at both phases of the trial. Numerous prejudicial and improper remarks were made by the prosecutors without objection. This misconduct is discussed in detail *infra*.

67. Mr. Cooksey's final address to the jury was hopelessly ineffective. For a mere seven minutes, he argued for his client's life. During that brief statement, he told the jury that, "on the evidence, Delma did a terrible thing," and that his client kept bad company. (S.F. Vol. IX at 2414). He also spent much of his short speech talking about a man who never even testified, Dr. Grigson. His positive comments about the client he had represented for five months were limited to one paragraph, and did not even cover all of the information given by the defense witnesses. A juror would have to be very generous to Mr. Cooksey to find that his closing showed sincerity or a belief that his client should live.

68. All of the errors referred to above deprived Delma Banks, Jr. of his right to the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, as well as Art. I, §§ 10, 13 and 19 of the Texas Constitution. For all these reasons, Mr. Banks is entitled to a new trial.

* * * *

THE PROSECUTORS ENGAGED IN REPEATED AND CONTINUING MISCONDUCT WHICH DENIED MR. BANKS A FAIR TRIAL.

102. The actions of the prosecutors in Mr. Banks' case were lawless and outrageous, profoundly distorting the truth-seeking function of the trial and wholly denying him due process of law. Their actions, including but by no means limited to those examples which follow, deprived Mr. Banks of rights guaranteed him by the federal Constitution and by

the Constitution and laws of the State of Texas. Mr. Banks' conviction and sentence of death therefore must be reversed.

103. First and foremost, the prosecutors engaged in a pattern of practices informed by racial discrimination, designed to assemble all-white juries and to impose harsher sentences in cases of crimes against whites. Their jury selection policies were designed to preclude black citizens from service on criminal petit juries by the calculated exercise of peremptory strikes on the basis of race, and their decision to seek the death penalty against Mr. Banks was consciously informed by the interracial nature of the crime.

104. Equally reprehensible, the prosecutors in Mr. Banks' case engaged in the wholesale misrepresentation of material facts to the jury at both phases of trial. As extensively detailed elsewhere in this Petition, the prosecutors concealed promises of leniency and favorable treatment made to key State's witness Charles Cook. Had this evidence been disclosed to the defense, as required by *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963), the jury likely would have rejected Cook's testimony and acquitted Mr. Banks.

105. In addition, as detailed elsewhere in this Petition, the prosecutors in Mr. Banks' case introduced and emphasized inflammatory "victim impact" evidence at every stage of trial. While some quantity of such evidence may be admissible at the sentencing phase of a capital trial, its introduction at the *guilt* phase of Mr. Banks' trial was intended to transform the trial into a "rush to judgment." As a result, Mr. Banks' guilt was measured not by the strength of the prosecution's evidence, but by the perceived tragedy of the victims' deaths. Equally important, *even if* such evidence might otherwise have been admissible, its introduction in Mr. Banks' case violated fundamental fairness because, upon information and belief, the prosecution simultaneously *concealed* evidence

that the deceased teenager was hardly the model youth the State made him out to be.

106. The prosecutors also knowingly presented misleading testimony during the examining trial, when witness Willie Huff intentionally left out the name of Robert Farr when describing Delma Banks' companions on the trip resulting in his arrest. This lie by omission was calculated to injure Mr. Banks by hiding Farr's identity, and thus secreting him from investigation or interviews by the defense.

107. The prosecutorial misconduct in Mr. Banks' case continued throughout voir dire, when the prosecutors took care to misstate the law to numerous prospective jurors. They repeatedly suggested that the meaning of "deliberate" conduct as comprehended by the first special issue of former Art. 37.071 was equivalent to "intentional" conduct as determined during the guilt phase. This knowing misstatement of the law violated the prosecutors' paramount duty to "do justice," rather than secure a conviction--or, in this case, a death sentence.

108. The prosecutors in Mr. Banks' case also engaged in inflammatory and materially misleading jury argument at both phases of trial. At the guilt phase, the prosecutors' misconduct included an astonishing litany of repeated references to their personal belief in the strength of the State's case. *See* S.F. Vol VIII at 2269 ("I'm proud of what Deputy Willie Huff found . . . . To begin with, he brings us the truth and like I said, this is a search for truth"); *id.* ("he went a step further and he solved for us one of the questions we have to answer"); 2270 ("Aren't we glad that we've got experts to help us find out the truth about these matters?"); *id.* ("Aren't we thankful that we have the resources so that we can afford to bring something like this to light and find out the truth about it?"); *id.* ("Defense has no questions of Willie Huff. They didn't want any part of him, because he came loaded. He had the truth."); *id.* ("in order to bring you the whole

truth, we call [sic] as our witness Marcus Jefferson"); 2271("I ask you to search your memories and recall the testimony and see if you can discern any reason why these people would falsify for vengence [sic] or for advantage or to save their hides. I didn't see any.[8]"; 2272 ("murder and truth will always out, folks. They might stay hid for a while, but eventually if good people work long enough and hard enough, the truth is going to come out, and it did"); 2273 ("We take our witnesses and we take the proof as it is given to us as we find it and as we search for it. That's the truth about this matter. Charles Cook brought you *absolute truth*") (emphasis added); 2276 ("Mr. Cooksey pointed his finger at him in numerous ways, but Charles Cook didn't budge from the truth and that's ample evidence that Charles Cook is telling the truth. That doesn't lie"); 2277 ("He [Whiteurs] told you the truth"); 2281 ("You know he [Whiteurs] told the truth").

109. It is well settled in Texas that a prosecutor commits reversible error when he attempts to bolster the credibility of witnesses with his personal opinion. *Gardner v. State*, 730 S.W.2d 675 (Tex. Crim. App. 1987); *Robillard v. State*, 641 S.W.2d 910 (Tex. Crim. App. 1983); *Menefee v. State*, 614 S.W.2d 167 (Tex. Crim. App. 1981). The Court of Criminal Appeals has "on many occasions condemned any effort on the part of the State to bolster the credibility of its witnesses by unsworn testimony." *Brown v. State*, 309 S.W.2d 452, 453 (Tex. Crim. App. 1958). "[D]etermination of the credibility of a witness is the job of the factfinder, not investigators and prosecutors. It is thus improper to suggest to the jury that they should defer to another's assessment of the truthfulness of testimony, no matter how 'experienced' that other may be."

[8] Of course, this argument has the added feature of being *a lie*, as well as being improper; the prosecutors knew, at a minimum, that Charles Cook had a reason to testify in favorably "for advantage or to save [his] hide," since, he was facing a possible life sentence on other charges if he chose not to cooperate.

Gardner, 730 S.W.2d at 698. The extreme nature of the violation in Mr. Banks' case, with the prosecutors' relentless insistence that their witnesses were telling the "truth," denied him a fundamentally fair trial, as guaranteed by the Sixth and Fourteenth Amendments.

110. Further, the prosecutors' guilt-phase closing arguments contained other impermissibly inflammatory arguments that deprived the proceeding of fundamental fairness. *See, e.g.*, S.F. Vol. VIII at 2303 ("We may as well burn this courthouse down and go away if we come up with any other verdict other than guilty of capital murder, because there will be no justice in Bowie County"); ("I want you to go from this place proud and holding your head high. I do not want you to be ashamed of what you have done here, and if you do not return a verdict of guilty, you will be ashamed").

111. The prosecutors also, again and again, urged the jury to consider the feelings of the victims' families in determining Mr. Banks' *guilt*. *See* S.F. Vol. VIII at 2267 (discussing the grief of the deceased's father); 2268 (describing the deceased's stellar character); 2270 (urging jury to weigh the "rights" of the deceased in determining *guilt*); 2278 (deploring that the deceased will "never see our rain" or "feel the warm sunshine on his cheeks"). While some such argument might, within Constitutional limits, be permitted at the punishment phase, each of these passages occurred during the *guilt*-phase argument. This misconduct, too, demands that Mr. Banks' conviction be reversed.

112. One additional argument deserves mention; during his guilt-phase closing argument, one prosecutor addressed the identification evidence proffered by the State:

> If there is one thing in this case about which there is absolutely no doubt, it is the identity of Delma Banks. He has been identified to the point that his hide could be recognized in a tannery.

Id. at 2266. It is impossible to imagine this metaphor—of Mr. Banks as a beast to be skinned—being used to describe a white person. In the tradition of the most despicable cross-burning demagoguery, this dehumanizing phrase was calculated to focus the jury's attention on the *color* Mr. Banks' "hide," and the difference between his color and that of his alleged victim. This racist tirade alone requires the reversal of Mr. Banks' conviction.

113. The prosecutors' misconduct continued in their punishment phase arguments. Among other impermissible pleas, the State's attorneys hammered on the inflammatory victim-impact evidence they had presented at both phases of trial. All these arguments, severally and collectively, deprived Mr. Banks of a fundamentally fair trial.

114. Further, upon information and belief, the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 363 U.S. 83 (1963). This evidence included information that pointed to another suspect in the murder, information that linked prosecution star witness Charles Cook to Robert Farr and to Texarkana generally, and information that would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a "set-up." This evidence was material to guilt and its disclosure to the jury could well have resulted in Mr. Banks' acquittal; the prosecution's determined concealment of the evidence deprived Mr. Banks of due process of law and a fundamentally fair trial.

115. The cumulative effect of the prosecutors' multifarious violations of rights guaranteed to Mr. Banks by the federal Constitution and the Constitution and laws of the State of Texas was to deny him a fundamentally fair trial. Mr. Banks'

* * * *

Signatures omitted in printing

Certificate of service omitted in printing

AFFIDAVIT OF DELMA BANKS, SR.

State of Texas)
) ss
County of Bowie)

Before me, the undersigned authority, appeared Delma Banks, Sr., who upon his oath deposes and states:

1. My name is Delma Banks, Sr. I am over eighteen years of age and am otherwise competent to make this statement,

2. I am the natural father of Delma Banks, Jr., who was convicted of capital murder in Bowie County, Texas in September, 1980.

3. When Delma, Jr. was in the third or fourth grade, he had a lot of trouble with his grades and was held back a year in school.

4. When Delma was very young and in elementary school, I received word from his principal, Mr. McGill, that he had been tricking some of the other boys at school out of their lunch money. To discipline him for that, when he got home, I tied him to a tree next to the house and whipped him with a leather belt or strap. I told him I would leave him tied to the tree all night and went away, to where he could not see me. I intended to watch him to see what he would do and to make sure nothing happened to him, but a neighbor let him loose from the tree. I never heard again that he was causing other people trouble at school.

5. Mrs. Banks and I hired Lynn Cooksey to represent Delma, Sr. because we heard that he was the best criminal lawyer in Texarkana. He said the fee would be $10,000, but we could pay $1,000 down and the rest on payments. He said he would set up a payment plan for us when we came to his office sometime. We went to his office a few times before the trial, but he never set up any plan and the most that we paid him was $1,500. He also told us at the time we hired him that

he wanted to have Dennis Waters, a private investigator, work with him. He said Mr. Waters' fee would be $1,500 and that we had to pay that immediately. We gave Mr. Waters the money in cash (initialed D.B.) in his office. The fees we paid to Mr. Cooksey and Mr. Waters used all of the money we had saved. We were poor people and made very little money.

6. Mr. Cooksey and Mr. Waters talked to us a few times about the case. Neither of them did anything to prepare me to testify at the punishment part of my son's trial. Mr. Cooksey just put me on the stand and had me answer his questions. They never asked me anything about Delma's childhood or personality.

7. One time Mr. Waters came to my house before the trial and told me that I should go to see a person who lived on my street who (initialed D.B.) might know something about the murder of the Whitehead boy. I told him that was his job. As far as I know he never talked to the person.

8. During the weeks before my son Delma, Jr.'s trial, my family received threats of physical violence by telephone from a number of unknown people. My wife was very frightened and moved with our children who were at home to live with her mother. During that time, we also changed our telephone number to try to avoid the calls.

9. Before my son's trial, my wife and I were leaving a meeting with Mr. Cooksey at his office. As we were leaving the building, looked back inside and saw Richard Whitehead's parents going into Mr. Cooksey's private office.

10. During my son's murder trial, I did not get to listen to the testimony in the courtroom because the District Attorney said I might be called as a witness for him and the judge made me stay outside the courtroom. My wife was kept out of the courtroom for the same reason. While we were outside the courtroom in the hallway, we never threatened anyone or caused any trouble to anyone. Somebody said we did, though,

and at one time during the trial, the judge called everyone in the hall into the courtroom and told us to stop threatening people. We did not know why he was doing that.

11. Before the testimony ended at the first part of the trial where the jury found Delma, Jr. guilty of killing Richard Whitehead, one morning Mr. Cooksey talked with my wife right outside the courthouse about testifying for Delma, Jr. at the first part of the trial. I did not hear all of the conversation, but I saw Mr. Cooksey grab my wife by her shoulders and shake her. Right away, I went to where they were at. As he shook her, he said, "What kind of a mother are you, that you won't tell a little white lie to save your son?" My daughter Jeannie was standing there too. I told him to take hands off of my wife and he did. She told him she would not lie on the stand like he had asked her to.

12. During my son's trial, while the jury was deliberating about whether to find him guilty of the murder, Mr. Cooksey asked me (initialed D.B.) and Elder G. N. Ford to meet with him and with Delma in a room near the courtroom. He said that if Delma, Jr. would say that he had killed Richard Whitehead, then the trial would end and he would get life in prison. He said he had talked with Judge Pesek and knew this would happen if Delma. Jr. cooperated. Mr. Cooksey said that if Delma. Jr. got a life sentence, he would be out in 7 or 8 years. He asked me to persuade Delma, Jr. to say that he had done it and I told him it was up to my son to decide what to say. Delma, Jr. refused to go along with Mr. Cooksey's idea, saying that he had not killed Richard Whitehead and would not lie like he had asked her to.

13. At no time after murder charges were filed against my son did I know that two lawyers, Jim Davis and Jim Hooper, were appointed by the court to represent him in the trial. I always that Mr. Cooksey was the lawyer after we hired him shortly after Delma Jr.'s arrest. I never heard from Mr. Davis

or Mr Hooper, nor was told by the court that they had been assigned to the case.

Further affiant sayeth not.

I affirm that the foregoing statement is true and correct to the best of my knowledge, and I so state under the pains and penalties of perjury.

/s/ Delma Banks, Sr.
DELMA BANKS, SR.

Signed and sworn before me this 10th day of January,1992.

/s/ _____

Notary Public, State of Texas

My commission Expires: 08/03/93

(Initialed e.b.)

AFFIDAVIT OF ELLEAN BANKS

State of Texas)
)
Bowie County)

Before me, the undersigned authority, appeared Ms. (initialed e.b.) Ellean Banks, who upon her oath states that the following is true and correct to the best of her knowledge and belief:

1. My name is Ms. (initialed e.b.) Ellean Banks. I live on Cemetary Road in Nash, Texas. Delma Banks, Jr., is my oldest son, the second oldest of my six children.

2. I am from Texarkana, but at the time that Delma, Jr. was born, we were living in Ft. Worth. Our family at that time was just my husband Delma Sr., our baby daughter Jeannie, and me. My labor with Delma Jr. was very long and difficult. It lasted for nearly twelve hours. He was a big baby, and I had a hard time giving birth. I was very glad that he seemed healthy when he was finally born.

3. However, only three or four days later, Delma, Jr. developed a bad rash. I took him to one doctor after another, and they gave him medicines and did tests to see what was causing the rash. It took a long time for them to figure out what was wrong, but they finally did. They told me that Delma Jr. was "hyperallergenic," or allergic to almost everything. They tried all kinds of medicines to cure him, and told me there were lots of foods that he shouldn't eat. But we didn't have much money to buy different food from what the rest of the family ate, and anyway it would have been nearly impossible to keep a child from eating the things he wanted to eat.

4. Delma Jr. was allergic to so many things. He couldn't even be around fish, without breaking out, and chicken was even worse. His father Delma Sr. aas working at a chicken

plant for a while, and Delma Jr. would get a terrible rash if his father even touched and played with him. It didn't matter if Delma Sr. took a shower and changed clothes, or whatever; it seemed like he just couldn't get enough of that chicken off of him to keep from giving Derma Jr. a bad rash. I think Delma Sr. ended up changing jobs because of that.

5. When Delma Jr. was little, and his allergies made him break out in hives, I almost never got a night's sleep. He would fuss and fuss all night, because he hurt so bad. I remember that I used to put socks on his little hands, and pin the socks to his diaper, to try to keep him from scratching at his face and arms. One time I did that, and many times when I woke up later and checked on him, Derma Jr. was rubbing his face on the pillow, twisting and turning his head, trying to scratch the rash on his face. He had rubbed his face completely raw, and his pillow was all bloody. I felt so sorry for him, and lots of times I lay awake and wondered what I could have done to have caused him to be sick that way.

6. Sometimes Delta Jr.'s allergies were life-threatening. I remember that one time when he was (initialed e.b.) about one year old he got a penicillin shot, and his face swelled up like a balloon. I was terribly afraid of what would happen to Delma Jr., but he survived. The doctor told us, though, that if it ever happened again, it might kill him. I went out and bought one of those little tags for him to wear, so that if I wasn't around people would still know that he was allergic to penicillin.

7. Delta Jr.'s allergies were a hard load for him to bear. They weren't the only bad thing about his childhood, however. My husband,. Delma Sr., had a terrible drinking problem, and his drinking nearly tore our family apart. I had not known when I met him that he could drink so heavily, or how awfully it would affect him. My family had been very Christian and strict, and I had had no experience with such things. I soon found out, to my sorrow. I don't like to talk about it such, because it was so terrible; Delma Sr. would get

drunk and he would get angry and holler at me. I would cry, because I was so afraid, and the children were terrified. I would take the children and run away, sometimes to my mother's, sometimes to other places. Later, of course, Delma Sr. would tell me that he was going to be better, and that he was going to stop drinking, and I always took him back. Before long, however, he would go to drinking again and the whole thing would start over. I thank God that, years later Delma Sr. finally gave up drinking for good, although that was years after Delma Jr. was grown. Even though my husband finally beat his drinking problem, I have often thought that if I had it to do over again, I would rather not have had my children, than to have made them suffer Delma Sr.'s drinking.

8. In Fort Worth, I worked in the housekeeping department at Peter Smith Hospital. When I had to work in the mornings, I would cook breakfast for the kids and leave it on the stove for them to eat when they woke up. One morning when Delma Jr. was about (initialed e.b.) three years old, he got up to eat and decided to turn on the stove. Kids are always imitating something they have seen a grown-up do, and I'm sure that's what Delma Jr. was doing. He turned on the burner, and because he didn't know how to turn it off, it got too hot and caught the food on fire. The food caught the wall on fire, and the fire spread quickly. Delma's sister Jeannie, who was only two years older than him, got him and woke up Delma Sr., and they all managed to get out of the house. The fire burned down nearly the whole house, but I was just glad that no one was hurt. I think that Delma Jr. has always felt very guilty about starting the fire, even though he was little and didn't mean any harm.

9. One winter, when Delma Jr. was about seven years old, after we had moved back to Texarkana, he was playing with some other kids out in the road in front of our house. It had rained and then frozen, and so the road was slick with ice. The kids were running and sliding on the ice. Delma's feet

went out from under him, and he fell down hard and hit the back of his head. The skin was broken and bleeding, so I took him down to the doctor to have him stitched back up. It was a pretty bad bump.

10. Delma Jr.'s allergies and the sores he always had really affected him when he was little. He was so self-conscious about how his arms and legs looked, and about the sores that his allergies caused him. He got teased a lot, and that made things even worse for him. Delma Jr. wanted so bad to play sports, but be was so ashamed of the sores on his arms and legs that he never wore short pants or a short-sleeved shirt. He would wear a long-sleeved shirt in the middle of summer, he was so concerned to cover up the sores. He used to get so mad that he would say to me, "Mama, why was I even born?" I felt terrible knowing how upset he was, and I tried to let him know how much I loved him, but he was always at the mercy of his allergies.

11. As Delma Jr. got older, I think that he continued to feel bad about himself because of the sores on his arms and legs. I know that he did not do well in high school, and that he finally left school for good when he was in the tenth grade. I don't know why he left. After Delma Jr. left school, he went into the Job Corps for a while, but he didn't stay there long. When he got back to Texarkana, he told us that he wanted to go in the Army. But before he could go in, he had to pass a physical, and the doctors rejected him because of his allergies and his skin condition. Delma Jr. was so disappointed he could hardly stand it, and I remember him saying again, "Mama, why was I born?"

12. After Delma Jr. left school, I think he got in with a bad crowd. I remember Robert Farr in particular; he was an older man, and I thought it was very strange that he was always hanging around with those younger boys. He would come over to our house, and sit on the porch, and say to Delma Jr., "Bring me something to eat," like Delma Jr. was his servant.

Delma Jr. would always go do it. Of course, Delma Jr. had always been the kind of boy who would do what other people told him; he was kind of a follower that way. He even took the blame, sometimes, for things I found out later that he had not done at all. I think he must have just been eager to please people, because his illness had left him with few close friends.

13. The racial prejudice that surrounded my son's trial caused our whole family fear and worry. Before the trial, we used to get threatening phone calls. I am sure that the people who called were white people. They used to threaten violence against Delma Jr. and against the rest of our family. One time, a crowd of young white people came down our street and right to our yard. My husband called the police, and the police came and ran them off, but I was still very afraid. In fact, because of the threatening calls, I ended up taking my children and moving in with my mother for almost a year.

14. One day while the jury aas still being picked for my son's trial, I and my husband Delma Sr. and my daughter Jeannie were talking to Lynn Cooksey outside the old courthouse in New Boston. Lynn Cooksey told me that he had decided that the only way to keep Delma Jr. from being convicted was to have me testify that Delma had been at home with our family on the night the boy was killed, and that I knew he had been there. I told Mr. Cooksey that no matter how much I loved my son, I could not lie to save him. He grabbed me by the shoulders and shook me hard, and said, "What kind of mother are you that won't tell a little to lie to save your own son?" Delma Sr. got mad at him and told him to get his hands off of me. He did, but he still wanted me to get on the stand and lie. I told him I wouldn't. My husband Delma Sr. stepped in and said *he* would take the stand and tell the story, but Mr. Cooksey said, "NO; we have to have the mother." I told him that I was not going to lie.

15. The night the jury convicted my son, they were out until very late, after 11:00 p.m. After they came back in with the guilty verdict, before we left the courthouse, Lynn Cooksey told me to get every black preacher I could find up to the courthouse the next morning. He didn't say what for. I went home and got on the phone and called people until three o'clock in the morning, and many of them came to the courthouse the next morning. However, Mr. Cooksey never took them aside or talked to them about what was happening, or what he might ask them if he called them to the stand. (initialed e.b.) Some of them had missed work to be there, and were not even called to testify.

16. Mr. Cooksey called me to the witness stand during that part of the trial. I was nervous and scared because of what was happening to my son, and I had no idea what Mr. Cooksey was going to ask me or what exactly I could say to help Delma Jr. Mr. Cooksey had never said to me what he planned to do if the jury found Delma Jr. guilty, and he had never taken me aside and talked to me about what he would ask me if I testified. I just begged the jury to spare my son's life, but if Mr. Cooksey had helped me get ready to testify I know I could have told the jury more important things about my son's life.

17. After the jury had gone out to decide their verdict, I asked Mr. Cooksey in the courtroom, "what are they going to do to my son?" He said, "They are going to kill him." He said that if the Whitehead boy had been black, he could have gotten Delma off with (initialed e.b.) probation.

Further affiant sayeth not.

I have read the foregoing affidavit, with paragraphs numbered 1 through 17, and it is true and correct to the best of my knowledge and belief. I so state, under the pains and penalties of perjury.

/s/ Ellean Banks
ELLEAN BANKS

Signed and sworn before me this 10th day of January, 1992.

/s/ _____
Notary Public, State of Texas

My commission expires: 08-03-93

(ss).

AFFIDAVIT OF PATRICK DELAUNE

County of Travis)
)
State of Texas)

1. My name is Patrick DeLaune. I currently reside in Austin, Texas. I am over eighteen years of age.

2. I am an investigator for the Texas Resource Center. In January 1992, I investigated circumstances surrounding the capital murder trial of Delma Banks, Jr. In that professional capacity, I spoke with Charles Cook, who testified at the trial. I spoke with Mr. Cook on January 10, 1992, at his residence in Dallas, Texas. We spoke from approximately 4:30 pm to 7:30 pm. During the last 1/2 hour of the interview, approximately, Mr. Cook's mother and friend were present.

3. Mr. Cook related information to me concerning his circumstances prior to his testimony. According to Mr. Cook, immediately before officials in Dallas obtained his first written statement concerning his knowledge of Delma Banks, those officials said that Delma was accusing Charles of being involved in the Whitehead murder. Mr. Cook indicated they were doing this as a way to encourage him to make a statement. Mr. Cook learned at a later time that Delma Banks had never made such accusations.

4. Mr. Cook also said that, when the authorities from Texarkana told him he needed to testify at the trial, they had him afraid of what might happen if he did not testify. Mr. Cook remembers them saying, we got your ass back in Dallas on a habitual, a life sentence. They said they could make the case come down hard on him, and that he'd be facing life in prison for it, if he did not help them out.

5. The authorities also threatened that they could charge him with being an accessory to capital murder, if he did not cooperate. He believed that they were serious and that he might be facing two life terms in prison if he did not

cooperate. When this investigator pointed out to Mr. Cook that he denied on the stand the information he was giving at present, another person in the room suggested that the prosecution had instructed him not to disclose such information while testifying. Mr. Cook acknowledged this suggestion.

6. Mr. Cook described rehearsals of his testimony, which took place in Texarkana shortly before the trial. He says that while he was in jail awaiting the trial, on three separate occasions, each on a different day, he went into the courtroom to rehearse his testimony. He recalls the lawyers for the state being present at all of these rehearsals. On each occasion, the lawyers would carefully go over what they wanted him to say on the stand.

I have read the foregoing statement, and swear under pain and penalty of perjury that it is true and correct to the best of my knowledge.

/s/ Patrick DeLaune
PATRICK DELAUNE

Subscribed and sworn to before me this 13th day of January, 1992.

_____
Notary Public, State of Texas

My commission Expired: 08-03-93

AFFIDAVIT OF DEMETRA JEFFERSON

State of Texas)
)
Bowie County)

Before me, the undersigned, authority, appeared Demetra Jefferson, who upon her oath deposes and says that the following is true and correct, to the best of her knowledge and belief:

1. My name is Demetra Jefferson. I live at the Town North Apartments in Texarkana, Texas. I am a lifelong close friend of Delma Banks, Jr., and the mother of four children by him.

2. In April, 1980, Delma Jr. and I had been romantically involved with one another for a long time, we had met in school. I was pregnant with our twin sons, and we were living at a house my mother had previously lived in, on 18th Street in Texarkana.

3. About a week before the Whitehead boy was murdered, Delma Jr. and my brother Vetrano were at the house where Delma Jr. and I were living. My brother had been drinking, and before long there was an argument and my brother threatened to hit me. Delma Jr. told him he had better not try. Vetrano told Delma Jr. that he would hit me if he wanted to, regardless of whether I was pregnant. But when he was about to, Delma Jr. pulled a gun out of his pants pocket and hit Vetrano in the face with it, to keep him from hitting me. Delma Jr. never threatened to kill Vetrano.

4. I was upset and scared, so Delma and I and our kids spent the night in a motel. Delma Jr. told my mother what had happened, but Vetrano went down to the police station and filed an assault or maybe attempted murder charge on Delma anyway. Delma Jr. then made himself scarce around the house, since he was afraid that the police were going to come looking for him there. When I talked with him, he

talked about our getting the family away from there, and maybe moving us and our kids to Dallas.

5. On the morning of April 11, Delma Jr. was discussing going away to Dallas to check things out and look into moving our family there. He told me he had picked up his last check and was going to head to Dallas. I told him I wanted to go with him, that we could all go as a family, but he said that it would be better for him to go first, and that we could come along as soon as he settled.

6. It was raining that night. I went to sleep in the evening, and was awakened when Delma Jr. came to the front door. He was with Richard Whitehead, whom I recognized both because I had seen him at school and because Delma Jr. told me who he was. They were riding in a green Mustang, and Richard was driving. Richard stayed in the car while Delma Jr. came up to the door. Delma Jr. told me that he had changed his mind and wasn't going to leave. Before he went back to the car and left with Richard, I noticed that Delma Jr. was missing *another* front tooth, and that there was a smudge of blood at the corner of his mouth. I figured that he and Richard had been in a fight against some other people. I didn't know what had happened. Richard was known at school as a source for illegal drugs. He sold marijuana, and also sold prescription drugs, and did both on campus.

7. My sister Sharon was married to a guy named Robert Farr, who was also heavily into prescription drugs. He had a bullet in his head, as a result of a shooting, and so was able often to obtain prescription drugs. He also used to steal prescription pads and write out his own. He was well-connected to law enforcement people, however, which kept him from getting in trouble for that.

8. During the two weeks or so between April 11 and when Delma Jr. was arrested, Willie Huff came to my mother's house. Willie Huff was a law officer. He took my brother

Vetrano away from the house. Vetrano told me and my parents afterward that Huff had taken him to the Little Brown Jug. At the Little Brown Jug, Huff had told him that he understood that Vetrano had a problem with Delma Jr. He offered to give Vetrano a gun so that he could "blow Delma's head off," and promised that he would make sure that nothing would happen to Vetrano if he did so. Vetrano told Huff that he would stick with the court charges against Delma. Then, when Huff brought him back to our house, Vetrano told me and my parents about the whole thing.

9. After Delma Jr. was arrested, in fact, Vetrano agreed to drop the charges he had made against Delma Jr. I called the police to tell them so, and they told me that Vetrano would not be allowed to drop the charges.

10. Lynn Cooksey, Delma Jr.'s attorney, talked to me only during the jury selection. He said that he might need me to testify. I had spoken briefly, for maybe twenty minutes or so, with his investigator Dennis Waters. Waters taped a conversation with me at his office, and spoke to me once at my house. Mr. Banks (Sr.) was also at Waters' office at the time I was there, although he was not present while Waters was speaking with me. I told Waters about what Willie Huff had said to Vetrano, and the whole story about why Delma Jr. had hit Vetrano with his gun.

11. During Delma Jr's trial, I was in the hallway outside the courtroom. Once, there was a break in the trial; because there had been claims that the proceedings needed more security, Delma was being taken out of the courtroom by himself before the jury was allowed to leave or before anyone else left. When he was brought through the doors into the hallway, I could see his hands. They were handcuffed. Through the windows in the courtroom door, I could see that the jury had not left.

12. I am familiar with the pervasive racism of the courts and other institutions in Bowie County. Black people are treated with contempt, and their problems are not treated with seriousness or respect. For example, my father was killed in a bar in 1982, and no one was ever tried for the crime. When I was present in the old courthouse for Delma Jr.'s trial, I was treated very rudely by all the white law officers in the courthouse. My conversations with other black people there confirmed that all the black people in the courthouse were being treated with a mixture of intense hostility and suspicion.

Further affiant sayeth not.

I have read the foregoing affidavit, and I affirm that it is true and correct to the best of ay knowledge and belief, and I so state under the pains and penalties of perjury.

_____

Signed and sworn before me this ___ day of January, 1992.

_____

Notary Public, State. of Texas

AFFIDAVIT OF GREGORIO PINA, III, PH.D.

Hidalgo County)
) ss
State of Texas)

I, Gregorio Pina, III, being first duly sworn on oath, depose and state as follows:

1. I am a duly licensed psychologist with a private practice in McAllen and Laredo, Texas. A complete summary of my experience and qualifications appears in my vita, which is attached to this affidavit as Exhibit A and made a part of it by this reference.

2. In early January, 1992, Mr. Delma Banks, Jr. was referred to me by his attorneys for an evaluation to address issues concerning his intellectual functioning and impairment, currently and in the past. He is a thirty-three year old single male on Death Row at Ellis I Unit penitentiary located in Huntsville, Texas. He is in prison there as a result of being convicted of capital murder in Bowie County, Texas in September, 1980.

3. On January 10, 1992, I administered the following tests to Mr. Banks: The Wechsler Adult Intelligence Scale—Revised (WAIS-R); The Reitan Indiana Aphasia Screening Test, and formal and informal psychoneurological screening. I also conducted a clinical interview regarding the following histories: developmental, medical, educational, drug, vocational, military, mental health, social, marriage, and legal. I further read portions of the written transcription of his discussions of various issues with the judge and his lawyer at the trial, as well as his trial testimony.

4. I was unable to conduct a complete evaluation of Mr. Banks because my evaluation was shortened by 1 1/2 hours due to an error in paperwork by prison officials. My request to continue and complete the evaluation on January 11, 1992

was refused by prison officials, despite the fact that Mr. Banks is scheduled to be executed on January 15, 1992. My evaluation is therefor only able to address areas in which gross deficiencies are present. A complete evaluation will require the administration of additional clinical measuring instruments and I strongly believe that they should be completed regarding Mr. Banks.

5. Mr. Banks was compliant and respectful during the evaluation. He was highly motivated to do everything I asked of him. He did not exhibit symptoms consistent with malingering. I do not believe that fatigue, malingering or any environmental conditions during the evaluation affected the results. Mr. Banks also demonstrated signs of confusion, lack of planning, impaired ability to deal with new situations, and impaired ability to switch from one task to another. He exhibited subtle communication problems and had serious difficulty talking about his personal history. His long term memory appeared to be grossly impaired.

6. At the time of this evaluation, Mr. Banks was functioning in the low average to average range of intelligence. He has a Verbal IQ of 82, a Performance IQ of 93, and a Full Scale IQ of 85. It is important to understand that these IQs represent Mr. Banks' highest levels of functioning in an ideal setting. When he is under substantial stress, he does not function as well intellectally, particularly when the stressful situation chiefly involves listening and responding verbally. A criminal trial at which his life is at stake would be such a profound stressor that it could have a marked negative effect on his intellectual functioning.

7. Mr. Banks' long term memory is terrible. He suffers from diffuse neurological disorder. Significant problems with naming objects, spelling, reading, reading comprehension, and verbal-mathematical problem-solving are also present. The WAIS-R and the Reitan Indiana Aphasia Screening test results indicate that Mr. Banks has suffered brain damage.

This is most clearly shown by his severely impaired long-term verbal memory and his difficulties in speaking and comprehending speech. Mr. Banks has attempted to compensate for these difficulties through enhanced visual memory.

8. My testing indicates that Mr. Banks has had to follow the lead of others because of his neurological problems. The extent of his disabilities is not immediately clear to the casual observer, as he tends to nod, smile and give people verbal responses he believes they expect to receive from him. This style of responding to the world around him makes Mr. Banks appear to others to have more intelligence and comprehension than he does. Such masking behavior is common and expected of people who have the neurological difficulties experienced by Mr. Banks.

9. The most difficult intellectual situation for Mr. Banks to function in is one in which information is being exchanged almost entirely through speech. He is similarly at a great disadvantage when he must try to explain himself to others. Stress further reduces his communication and comprehension capabilities. He decides what to do and say in such uncomfortable situations by watching others carefully and picking up visual cues such as facial expressions and body language. His neurological deficits appear to be so severe that these visual cues often form the primary basis for his decisions. He then acts or speaks in a way that he believes the people he is interacting with want him to, based on the visual cues.

10. Legal proceedings are particularly difficult for Mr. Banks to understand, relying as they do, primarily on complex verbal information. His tendancy is to rely even more heavily than he normally does on visual cues from lawyers and the judge in the courtroom. Particularly in a stressful situation, such as his own trial, he is very susceptible to suggestion and likely to indicate understanding when he has none. The portions of the trial transcript that I read well illustrated these problems.

11. The combination of Mr. Banks' follower personality with his organic brain damage had serious implications for his trial. Unaware of the extent of his disabilities, there was a great potential for both the Court and his lawyer to overestimate his understanding and intelligence. Indeed, his competency to stand trial in 1980 is very much open to question. Closely related to the issue of competency is the issue of communication with legal counsel. Trial counsel in 1980 would had to have been extraordinarily careful and patient in dealing with Mr. Banks to overcome the barrier posed by his neurological deficits in combination with his personality style. It is likely that not only did Mr. Banks not understand much of what was happening at his trial, but he also did not understand much of what his lawyer was saying.

Further affiant sayeth not.

_____

Signed and sworn to before me this 13th day of January, 1992.

_____

Notary Public, State of Texas

IN THE TEXAS COURT OF CRIMINAL APPEALS

[Filed Feb. 24, 1993]

Cause No. ___

EX PARTE DELMA BANKS, JR.,
Petitioner.

AMENDED AFFIDAVIT
OF GREGORIO PINA. Ph.D.

Delma Banks, through undersigned counsel, files herewith the amended affidavit of Dr. Gregorio Pina, in support of the claims for relief in Mr. Banks' Application for Post-Conviction Writ of Habeas Corpus.

Respectfully submitted,

CLIFTON L. HOLMES
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ATTORNEYS FOR APPLICANT

BY: Robert C. Owen
ROBERT C. OWEN
Texas Bar No. 15371950

AFFIDAVIT OF GREGORIO PINA, III, Ph.D.

State of Texas)
)
Hidalgo County)

Before me, the undersigned authority, personally appeared GREGORIO PINA, III, Ph.D., who upon his oath stated the following:

1. My name is Gregorio, Pina, III. I am a psychologist licensed in the State of Texas (State Board of Examiners of Psychology license # 2180), and am presently in private practice in McAllen, Texas. I specialize in trauma, police, and criminal psychology. A copy of my current curriculum vita is attached to this affidavit.

2. In January, 1992, I evaluated Delma Banks, Jr., an inmate on Texas' Death Row, at the request of his attorneys. I was asked to determine his present intellectual functioning and psychological impairment, if any, and to reach a conclusion, if possible, concerning Mr. Banks' mental status at the time of the offense and trial in 1980. Due to human error at the prison where Mr. Banks is incarcerated, I was not able to complete that initial evaluation, Subsequently, I was asked to complete my assessment, and did so in January, 1993.

3. On the second evaluation, I administered the Wechsler Adult Intelligence Scale—Revised (WAIS-R), the Stanford-Binet Intelligence Scale, the Rorschach (inkblot) test, the Thematic Apperception Test, the Minnesota Multiphasic Personality Inventory (MMPI-2), and formal and informal neuropsychological testing. These neuropsychological tests included the Wechsler Memory Scale—Revised, the Trail Making Test (part A), the Reitan Indiana Aphasia Screening Test, and portions of the Luria Nebraska Neuropsychological Battery.

4. On both occasions, I obtained Mr. Banks' history with respect to the following topics: mental and physical development, past medical treatment, educational background, drug use, vocational experience, mental health treatment, social experience, marriage and sexual history, encounters with the criminal justice system, and adjustment to prison. In addition, I reviewed transcripts from his trial, including conferences between Mr. Banks, the judge, and his attorney, and Mr. Banks' own testimony.

5. Mr. Banks was highly motivated. He became absorbed by the tasks presented, and initiated and maintained tasks without having to be pushed. He was persistent and challenged to do well. I detected no sign of malingering. Other factors that could bias test results, such as fatigue or interference from the test-taking environment, were controlled and were within normal limits.

6. The results of both test batteries are consistent with one another, and I believe accurately reflect Mr. Banks' limited cognitive capacity and psychological impairment. It is critical to note in this regard that Mr. Banks' results on these tests represent his *optimal* capacity in a controlled environment: Psychologists describe such a testing performance as "elevated," since it does not accurately reflect the subject's unadaptive intelligence in the domain of auditory reception and verbal expression. Because of the character of Mr. Banks' impairments, it is highly likely that his performance on all measures would deteriorate markedly if he were called upon to make decisions quickly and under stress, such as the tension of a courtroom proceeding. In particular, several of Mr. Banks' limitations impair his ability to communicate meaningfully; thus, any combination of stress with a need to express himself verbally, or to process verbal information from other sources, would dramatically reduce Mr. Banks' ability to communicate accurately his thoughts and feelings.

7. It is also important to note that as Mr. Banks has aged, he, like persons with similar deficiencies, has learned additional adaptive and coping styles to attempt to compensate for his impairments. Mr. Banks exhibits a type of neurological damage (see below) which may have permitted him to respond positively to structure, by attempting to pair his strengths with his weaknesses. In a highly structured environment, prison, Mr. Banks has used the Bible to learn to read. It is reasonable to assume that, had Mr. Banks remained outside prison, he would not have improved his ability in this regard. As a result, it is my professional opinion, held with a reasonable degree of scientific certainty, that Mr. Banks' test scores on all measures would have been significantly deflated in 1980.

8. Mr. Banks' present intellectual functioning, as measured by the Stanford-Binet IQ test and adjusted for age norms, is in the borderline mentally retarded range (73). As a result of his low cognitive ability, Mr. Banks exhibits subtle communication problems, confusion when switching tasks, an inability to plan, and difficulty processing and responding to new or unexpected situations. His short-term memory falls into the mentally retarded range (subtest score of 68); Mr. Banks' long-term memory, too, especially of childhood experiences, appears deficient.

9. Two different instruments were used in this evaluation to measure Mr. Banks' intellectual functioning: the WAIS-R (see above) and the Stanford-Binet. The WAIS-R was administered in both 1992 and 1993. Mr. Banks' verbal IQ score on the WAIS-R was 82 in 1992, and 75 in 1993; his performance IQ score was 93 in 1992 and 95 in 1993, for a full-scale IQ of 85 in 1992 and 81 in 1993. While these scores might suggest a somewhat higher level of intellectual functioning, it is my professional opinion that Mr. Banks' adjusted score on the Stanford-Binet test (indicating a full-scale IQ of 73) more accurately reflects the severity of his

cognitive deficit. First, the Stanford-Binet is more sensitive to the cultural differences between Caucasian and African-American, subjects; second, I have adjusted Mr. Banks' score for his age, taking into account the fact that the Stanford-Binet norms are computed only through (approximately) age 24. I am confident that Mr. Banks' intellectual functioning may most fairly and accurately be described as in the borderline mentally retarded range.

10. Further, neuropsychological testing indicates that Mr. Banks suffers from an organic brain impairment. His response patterns indicate a mild and diffuse neurological impairment and a learning and language disability. These findings are corroborated by Mr. Banks' poor performance in school; despite his inability to learn, however, he was repeatedly promoted from one grade to the next. He indicates that he did not begin to read adequately until his present incarceration and his study of the Bible.

11. The twenty-point spread between Mr. Banks' verbal and performance IQ scores is statistically significant as an indicator of neurological damage. Mr. Banks' Stanford-Binet Short Term Memory intelligence score of 67, and his Abstract and Visual, Reasoning score of 61, are either in the mentally deficient range or slightly above. The spread between subtests is statistically significant toward a learning and language disability (note: this instrument is standardized only to age twenty-three years, eleven months, fifteen days). Mr. Banks evidenced a spelling disability in several tasks. He was unable to read the MMPI-2, so that it had to be read to him. His Wechsler Memory Scale score is also in the defective range.

12. In addition to his substantial cognitive deficit, Mr. Banks suffers from severe psychological impairments of long standing. He suffers from moderate to severe depression (including periodic suicidal ideation), complicated by feelings of extremely low self-esteem and an almost complete lack of self worth. He also exhibits a remarkable deference to the

apparent will of others; Mr. Banks' eagerness to please, as explained *infra*, is symptomatic of both his low intelligence (he has learned to "go along" in order to "pass" for a person of normal intelligence) and the aforementioned psychological impairments.

13. I noted in my original affidavit in this case (based on the incomplete evaluation described above) that Mr. Banks' long-term memory, especially his historical memory, was extremely deficient. The completed evaluation has revealed the likely reason for Mr. Banks' memory problems, namely, the experience of trauma at an early age which has had severe and catastrophic consequences for Mr. Banks's personality development. Such experiences produce memory problems because the mind tends to deal with otherwise intolerable psychological pain by isolating, or fragmenting, the experience that caused the pain.

14. Mr. Banks experienced a number of striking traumas as a child, all of which are likely to have had destructive consequences for his emotional and psychological development. For example, he accidentally burned down the family home at age five, leaving him with lifelong feelings of severe survival guilt. He was also beaten and terrorized by his alcoholic father; at least one such beating involved young Delma's being tied to a tree and whipped. These experiences alone would be enough to account for a large part of Mr. Banks' psychological impairment but even they do not approach the effects he suffered by being severely hyperallergenic from birth.

15. From Mr. Banks' birth, he has suffered from a severe and chronic dermatological illness characterized by hives, rashes, and severe and uncontrollable burning and itching of the skin. His physicians have been unable to treat his condition; it has had severe traumatic and permanent disabling effects in every area of his physical, emotional, cognitive, and psychological development. To take just one

example: Mr. Banks did not develop normal sleep patterns as an infant due to his condition; he slept only after exhaustion. His mother would put his hands in socks and pin the socks to his diaper to attempt to keep him from scratching himself in his sleep; yet he would rub his face on the pillow until it was raw and bleeding. It is likely that Mr. Banks' illness, compounding the trouble in his parents' marriage from his father's alcoholism, impaired the development of normal and supportive bonding relationships between Delma and his mother and father. These consequences are representative of the thoroughgoing effects of his illness that have pervaded Mr. Banks' life to date.

16. As a result of his condition, Mr. Banks suffered from chronic raw and bleeding skin and hives throughout childhood and adolescence. These largely untreated symptoms, in turn, led directly to childhood, adolescent, and adult (skin) disfigurement. They also had *catastrophic* consequences for Mr. Banks' emotional and psychological development. Mr. Banks learned to see himself as he thought the world saw him: as a ghastly, frightful, monstrous eyesore. He understandably went to great lengths to hide himself from public view throughout life. For example, he has avoided going out in public; when doing so was unavoidable, Mr. Banks covered as much of his skin as possible. He routinely wore long sleeve shirts even in the summers (and wore them buttoned all, the way to the top), and refused to wear short pants as a child even when playing games. He was openly ridiculed by other children in his neighborhood school, and church; even his family sometimes teased him about his unavoidable condition. Because the other children shut Delma Jr. out, he did not play with them or develop friends in the normal fashion. His fears of rejection, confirmed by his classmates, only led to lower self-esteem.

17. Rejected by his peers and others in the community, Mr. Banks understandably developed an overwhelming need

for acceptance; at the same time, the absence of such acceptance created in him an intense survival guilt and low self-esteem, approaching self-hatred. Mr. Banks even exhibited suicidal ideation as a child, a tendency which has continued into adulthood. In addition, he developed (and continues to display) a constricted affect toward the depressive end of the spectrum; that is, his ability to experience and express feelings were "shut down," and he tends to experience life as frustrating and meaningless. Mr. Banks' anxiety and depressive reactions, in turn, appear actually to have aggravated the physiological intensity of his hyperallergenic reactions in a sort of vicious cycle.

18. Mr. Banks' low cognitive capacity only made it more difficult for him to deal positively with his physiological impairment. Because of his borderline mental retardation and learning disability, Mr. Banks lacked some of the most important resources that can help an individual surmount a medical handicap. When humans find words to express their pain, they may also find relief. Only since his incarceration has Mr. Banks begun to find those words and taken the very first steps toward understanding his painful and tragic experience. At the time of the offense, and at the time of trial, Mr. Banks was unable to find relief from his physical and psychological torment in such expression. Instead, he relied—as he had learned in childhood, and had continued to do as an adolescent—on the adaptive style he found least painful: making his needs subservient to others' at any cost. That is, Mr. Banks had learned to alleviate the pain of rejection and alienation by completely sublimating his own wants, desires, and needs to those of others, in an attempt to maintain human contact. In many situations, this meant being the "scapegoat"—taking the blame for the actions of a sibling or a classmate, in hopes, of being, treated kindly in return. Mr. Banks learned to be the "scapegoat" from infancy to the present, and it is a pattern of thought and behavior that is extremely ingrained in his psychological makeup.

19. In sum, it is my definite impression, based on objective measures of Mr. Banks' cognitive functioning, and a careful interpretive assessment of his psychological development and impairment, that at the time of his trial in 1980 this young man was incapable of understanding the full consequences of the legal decisions he was called upon to make. Mr. Banks' low intelligence, and its destructive consequences for his ability to process verbal information and express himself meaningfully in response, compounded by the stressful courtroom situation, make it extremely unlikely that he could have appreciated the alternatives presented to him or reasoned his way to a choice among them, particularly without simplified explanations. Moreover, as a result of the extraordinary skin disease which has haunted his entire life, Mr. Banks had spent years eagerly attempting to please others by "going along;" he was, in effect, programmed from childhood to defer to the advice and suggestions of others, not to assert his own interests. Any nods, smiles, and gestures only indicated Mr. Banks' strong desire to please those in authority at any cost, including abandoning the fight for his own life. Because his emotional and psychological development were distorted by the continuing experience of his illness, Mr. Banks never developed appropriate defense mechanisms, judgment or insight; he lacked the ability to predict the consequences of his actions and displayed a marked tendency toward self-destructive behavior.

20. At the same time, some of these features of Mr. Banks' psychological profile accurately would have predicted that he would prove a "safe," nonviolent inmate during his present incarceration. As noted above, Mr. Banks' cognitive impairment and learning disability make him safer in a highly structured environment, such as prison, because the possibilities of novel or unexpected challenges and stress—which can aggravate Mr. Hanks' particular limitations and cause him to react without thinking, perhaps even violently—are minimal there. In addition, Mr. Banks' empathic abilities are

high, and he demonstrates high morals. He is best described as a docile, obedient, and subservient person who is eager to please even those who incarcerate him. This surmise would have been obvious to any competent mental health professional evaluating Mr. Banks in 1980.

Further affiant sayeth not.

I, Gregorio Pina, III, have read the foregoing affidavit. The matters asserted in this statement are true and correct to the best of my knowledge and belief, and I so state under the pains and penalties of perjury.

/s/ Gregorio Pina, III
GREGORIO PINA, III, Ph.D.

Signed and sworn in my presence this 22nd day of February, 1993.

/s/ Laura Pitchford
Notary Public, State of Texas
My Commission expires:_____

STATEMENT OF ROBERT HARLAN

County of Travis)
) ss
State of Texas)

1. My name is Robert Harlan. I am over eighteen years of age. I am the owner of Harlan Motors, an auto mechanic shop located at 1805 East 6th Street, Austin, Texas. I have owned and run this shop for five years and have worked as a full time mechanic for eight years.

2. I have reviewed excerpts of testimony taken from the capital murder trial of Delma Banks, Jr., which took place in Bowie County, September 1980. The testimony I have read concerns the 1964 Ford Mustang owned by the murder victim. This consists of testimony given by Patricia Hicks, Patty Bungardt, Larry Whitehead, and pretrial testimony of Willie Huff. I also reviewed weather reports from the night of the incident, and discussed with an investigator other testimony indicating that the car was driven to Dallas the night of the crime. I have been asked by Mr. Banks' attorneys to comment as to the condition of the car at the time of the incident, based on the description of the car's condition in the reviewed testimony.

3. While the mechanical failure of the Mustang could be attributed to something as simple as a shorted battery, it is my experience that battery-charging problems most often involve the battery in addition to either the alternator or voltage regulator.

4. The jump-starts described by Hicks were accompanied by her recollection of Richard Whitehead attributing the problem to the "carburetor." Since the carburetor could have no influence on this problem, it is likely that Whitehead had actually blamed the problem on the *alternator*, and Hicks

remembered incorrectly. His attributing the problem to something that was not the battery alone directly suggests that either the alternator or regulator was not functioning properly.

5. Replacing a car battery by a mechanic with tools is generally flat-rated at one-half hour's labor. To replace the alternator and voltage regulator, for an experienced mechanic with tools, would involve two hours' labor. In the likely circumstance that something in addition to the battery was to blame for the mechanical failure, it is doubtful that the car could have been driven from Texarkana to Dallas (approximately 3 hours) by simply replacing the battery. A weak charging system would not allow both the lights and windshield wipers to be operated over roughly one hour, even on a new battery. It is inconceivable that the car could have gone from Texarkana to Dallas, and then be driven for two days in Dallas, without making the necessary repairs.

I have read the foregoing affidavit, and it is true and correct to the best of my knowledge and belief. I so state under the pains and penalties of perjury.

/s/ Robert Harlan
ROBERT HARLAN

Signed and sworn before me on this 12th day of January, 1992.

/s/ Robert C. Owen
Notary Public, State of Texas
My commission expires: 08-03-93

IN THE 102ND DISTRICT COURT OF BOWIE COUNTY
NEW BOSTON, TEXAS

[Filed Apr. 1,1992]

No. ___

EX PARTE: DELMA BANKS, JR.

MOTION FOR DISCOVERY

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now DELMA BANKS, JR., by and through his attorney of record, CLIFTON L. HOLMES, and moves this honorable Court to grant discovery, as detailed specifically *infra*, in the above-styled matter. In support of which, Movant would show:

I.

INTRODUCTION AND COURSE OF PRIOR PROCEEDINGS

Defendant was convicted of capital murder in the 102nd District Court of Bowie County, Texas, on September 30, 1980, and was assessed the death penalty on October 1, 1980. His conviction and sentence were affirmed on direct appeal. *Banks v. State*, 643 S.W.2d 129 (Tex. Crim. App. 1983). The Supreme Court denied *certiorari*. *Banks v. Texas*, 464 U.S. 904 (1983). Mr. Banks unsuccessfully sought postconviction relief under Tex. Code Crim. Proc. Art. 11.07. *See Ex Parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

By order of December 10, 1991, this Court set Mr. Banks' execution for January 15, 1992. Pursuant to Tex. Code Crim. Proc. Art. 1 Mr. Banks filed a verified application for post-conviction writ of habeas corpus on January 13, 1992. This application alleged, *inter alia*, that "the Bowie County

District Attorney's systematic and intentional practice of using peremptory strikes to exclude qualified black venirepersons from criminal trials, continued in the instant case, violated Mr. Banks' right to equal protection of the laws and denied him a fundamentally fair trial." *Id.* at 6. This Court modified Mr. Banks' execution date to March 15, 1992, and later to April 30, 1992. The State has not yet responded to Mr. Banks' verified application for post-conviction writ of habeas corpus.

II.

WHY THIS COURT SHOULD ORDER DISCOVERY

Mr. Banks' Application for Post-conviction Writ of Habeas Corpus raises profoundly disturbing questions about the quality of justice meted out in Bowie County in the years prior to, and immediately following, Mr. Banks' capital murder trial in 1980. Mr. Banks, an African-American man, was tried by an all-white jury for the robbery-murder of a white teenager. Mr. Banks has alleged that the District Attorney intentionally exercised peremptory challenges to remove qualified blacks from Mr. Banks' jury pool, solely on the basis of their race. Sworn testimony from local attorneys confirms that the District Attorney's actions in Mr. Banks' case were not unique, but were consistent with a pattern and practice of racial discrimination in jury selection in Bowie County, stretching back at least as far as 1965.

Mr. Banks seeks to demonstrate by direct evidence the systematic and intentional exclusion of black citizens from criminal jury service in Bowie County during the years preceding, and immediately following, his trial. In support of this constitutional challenge, Mr. Banks has already presented to this Court the affidavits of two respected members of the local bar, as well as an affidavit recounting a conversation with a former Bowie County District Attorney, who acknowledged that his office maintained a *de facto* policy of

striking qualified black venirepersons in criminal cases. *See* Exhibits L (Affidavit of Jim Davis, Esq.), G (Affidavit of Clyde E. Lee, Esq.), H (Affidavit of Lynn B. Lamberty), I (Affidavit of Robert C. Owen) to Application for Post-Conviction Writ of Habeas Corpus. With this Motion, Mr. Banks submits an additional affidavit, from Sherman A. Kusin, Esq., another longtime member of the Bowie County bar. *See* Appendix A (Affidavit of Sherman A. Kusin, Esq.). Like the other attorneys whose sworn statements are in the record before this Court, Mr. Kusin confirms from personal knowledge that "between 1965 and 1980," "it was the obvious practice of the [Bowie, County] District Attorney's office in criminal cases . . . to use peremptory strikes against otherwise qualified black jurors." Appendix A. Mr. Kusin's experience in the Bowie County courts is extensive; during the fifteen years in question, he estimates that he tried approximately one hundred and eighty (180) criminal cases to juries, including four (4) or five (5) murder cases. *Id.* In about sixty percent (60%) of those cases, Mr. Kusin recalls, the defendant was black; yet, "all-white juries . . . were overwhelmingly the rule." *Id.*

In addition, counsel here proffers that yet another Bowie County attorney, Tom Newman, Esq., would likewise attest that local prosecutors, before and at the time of Mr. Banks' trial, had an "unwritten rule" of routinely exercising their peremptory challenges to remove black persons from the jury. Mr. Newman, officed at 219 West Broad Street in Texarkana, recalls having tried between 10 and 15 felony cases between 1975 and 1985, and specifically recalls three trials of black defendants (two murder cases and one aggravated sexual abuse case) in which no black persons served on the jury.

The Bowie County bar calls this Court to action with one voice, and that one voice declares that intentional racial discrimination was an unvarying practice of the District Attorney's Office in selecting felony trial juries in the years

leading up to, and following, Mr. Banks' capital murder trial. By means of the discovery here sought, Mr. Banks can demonstrate the harsh reality of this pattern and practice, and its fatally prejudicial consequences for his conviction and death sentence.

III.

INFORMATION SOUGHT TO BE DISCOVERED

Documents in the exclusive possession of the Bowie County District Attorney's Office will corroborate Mr. Banks' allegation of intentional racial discrimination in jury selection. The most important of such documents include the jury selection sheets and juror information sheets from all felony jury trials between 1965 (the earliest year concerning which Mr. Banks has presented sworn testimony concerning racial discrimination in jury selection in Bowie County) and 1982. According to sworn testimony presented by Mr. Banks, *see* Exhibits H, I, G, and L to Application for Post-Conviction Writ of Habeas Corpus, at least some of these documents contain notations of the race of prospective black jurors, a strong *prima facie* indicator of intent to discriminate on that basis. Mr. Banks requests that this Court allow him to inspect and copy such documents so that he may append them to his Application for Post-Conviction Writ of Habeas Corpus in support of his claim under *Swain v. Alabama*, 380 U.S. 202 (1965).

Other documentary evidence in support of this claim, also in the exclusive possession of the Bowie County District Attorney's Office, would include any memoranda, monographs, policy statements, or training materials circulated among and/or used by attorneys in the District Attorney's Office with respect to jury selection criteria in felony cases. Mr. Banks likewise requests to inspect and copy any such documents.

In addition, any memoranda or policy statements of the Bowie County Jury Commissioners, when that body was in existence, or any minutes of meetings thereof, or correspondence thereof with the District Attorney's Office, concerning criteria for drawing and assembling the county jury venire, could support the inference of intentional racial discrimination that is necessary to Mr. Banks' claim. *See Amadeo v. Zant*, 486 U.S. 214 (1988). Mr. Banks requests to inspect and copy any such documents.

IV.

THIS COURT'S AUTHORITY TO ORDER DISCOVERY

It is essential that Mr. Banks obtain the requested evidence through discovery since he has no other means of obtaining it. To deny the relief requested in this motion would be to deny Mr. Banks the opportunity for a full and fair hearing on his constitutional claims in this Court.

This Court's authority to grant the discovery requested is grounded in several sources. First, in connection with applications for post-conviction writs of habeas corpus, Article 11.07 of the Texas Code of Criminal Procedure requires this Court to determine the legality of the applicant's confinement and to resolve all issues of fact material to the legality of the applicant's confinement. In order to perform this task, Article 11.07 authorizes this Court, among other things, to "order affidavits, depositions, interrogatories, and hearings" as well as "any other matters" the Court deems appropriate. See Article 11.07, Sections 2 (c) & (d).

Second, Section 21.001(a) of the Texas Government code further expressly grants this Court "all powers necessary for the exercise of its jurisdiction . . ., including the authority to issue the writs and orders necessary or proper in aid of its jurisdiction." Because Article 11 of the Texas Code of Criminal Procedure expressly vests this Court with jurisdiction to entertain Mr. Banks's application for a writ of

habeas corpus, Section 21.001(a) of the Texas Government Code grants this court full power to exercise the jurisdiction and to perform the functions entrusted to it by the Texas legislature.

Third, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution entitle Mr. Banks to the discovery requested here. The United States Supreme Court repeatedly has held the "opportunity to be allowed to substantiate a claim before it is rejected" is a basic and essential ingredient of due process. *Ford v. Wainwright*, 477 U.S. 399, 414 (1986). As explained above, the discovery requested here is essential for Mr. Banks to substantiate his claims. In capital proceedings, moreover, the Eighth Amendment demands that factfinding procedures meet a heightened standard of reliability. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Spaziano v. Florida*, 468 U.S. 447, 456 (1984). "This especial concern is a natural consequence of knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford*, 477 U.S. at 411.

Finally, there are practical reasons to grant the discovery requested in this motion. Federal law provides that findings of fact in state habeas corpus proceedings shall not be entitled to any presumption of correctness or validity where, among other things, the state proceedings were not full, fair, and adequate. *See* 28 U.S.C. 2254 (d); *Townsend v. Sain*, 372 U.S. 293 (1963). Applying this statutory command, the federal courts have extended no deference or weight to state court habeas determinations where state courts or state law have restricted the petitioner's ability to gather evidence needed to present their claims to the state court. *See Moore v. Kemp*, 809 F.2d 702, 730 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987); *Marble v. Edwards*, 457 F.2d 759 (5th Cir. 1972). Failure to grant the discovery requested thus raises the possibility that this court's findings and conclusions may not

be afforded deference in subsequent proceedings. This Court should grant Mr. Banks discovery to ensure that the findings it ultimately enters are adequately supported by a factual record compiled in a fair manner, consistent with the demands of due process and the extraordinary stakes in the present litigation—Delma Banks' life.

V. CONCLUSION AND PRAYER FOR RELIEF

Mr. Banks' discovery request is narrowly tailored to require disclosure of only that information necessary to the proof of his claim under *Swain*. He has presented substantial direct proof of racial discrimination in jury selection through the attorney affidavits submitted with his original Application of January 13 and the additional affidavit and proffer presented with this Motion. Most important, this Court is aware that the interest of our system of justice in eradicating the vestiges of institutionalized racial discrimination from criminal trials, particularly in capital cases, is paramount. This Court should allow Mr. Banks the discovery necessary to prove his claim outright.

WHEREFORE, Applicant Delma Banks, Jr., prays that this Honorable Court:

1. Allow him to be heard by counsel on the matters contained in the present motion, and to present testimony in support thereof;
2. Grant him the limited discovery specified in this Motion,
3. Grant such other relief as law and justice require.

Respectfully submitted,

/s/ Clifton L. Holmes
CLIFTON L. HOLMES
Attorney at law
P.O. Drawer 3267
Longview, Texas 75601
903-758-2200

ATTORNEY FOR
DELMA BANKS, JR.

APPENDIX A

State of Texas)
Bowie County)

AFFIDAVIT OF SHERMAN A. KUSIN

Before me, the undersigned authority, appeared Sherman A. Kusin, who upon his oath deposes and says that the following is true and correct:

1. My name is Sherman A. Kusin. I am an attorney licensed to practice in the States of Texas and Arkansas, and maintain an office at 2501 Summerhill Road in Texarkana, Texas. I have been a member of the Texas bar since 1965. I am over eighteen years of age and am otherwise competent to make this statement.

2. In the course of my practice, I have tried many criminal cases to juries in Bowie County, Texas. Although I cannot state exactly how many such cases I tried between 1965 and 1980, I tried criminal cases to a jury on an average of once per month during that 15 year period. I tried four or five murder cases in Bowie County during that time. In approximately 60% of all the criminal cases I tried, my client, the defendant, was black.

3. During that era, it was the obvious practice of the District Attorney's office in criminal cases in which I participated in Bowie County to use peremptory strikes against otherwise qualified black prospective jurors. As a result, all-white juries in my criminal cases in Bowie County were overwhelmingly the rule. I cannot remember trying a murder case in Bowie County in which a black person was allowed to sit on the jury. Every otherwise qualified black venireperson was stricken by the State through the use of peremptory challenges.

4. In the criminal cases in which I was involved, far less than 22% of the pool of venirepersons from which the jury was selected were black. This was due to the fact that jurors in Texas were selected from real property rolls during the period from 1965 through 1980 and few blacks were real property owners. I am confident, based upon my conversations with other attorneys in Bowie County, that my experience is representative of that of other lawyers here, at least during the period 1965 through 1980. The district attorney using peremptory challenges to strike black jurors and the underrepresentation of blacks in the jury pool for criminal trials was simply the way things were done in the criminal justice system in Bowie County and was the accepted practice during that time.

Further affiant sayeth not.

I have read the foregoing affidavit and affirm that it is true and correct, and I so state under the pains and penalties of perjury.

/s/ Sherman A Kusin
SHERMAN A KUSIN

Sworn and signed before me this
10th day of March, 1992.

/s/ Jackie Smith
JACKIE SMITH
Notary Public, State of Texas
(ss).

[Certificate of Service Omitted in Printing]

IN THE 102ND DISTRICT COURT OF
BOWIE COUNTY NEW BOSTON, TEXAS

No. ___

EX PARTE: DELMA BANKS, JR.

ORDER

ON APPLICANT'S MOTION FOR DISCOVERY

Applicant's Motion for Discovery is hereby GRANTED. Counsel for Applicant is ordered to arrange with Counsel for Respondent, within a reasonable period, a mutually convenient time for the inspection and, if necessary, copying of the documents described in Applicant's Motion for Discovery.

Signed and entered this__ day of_____,1992.

_____
Judge Presiding
102nd Judicial District Court

IN THE 102ND DISTRICT COURT OF
BOWIE COUNTY AT NEW BOSTON, TEXAS
and
IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN

[Filed Oct. 1, 1992]

No. ___
(Bowie County No. 80-F-86)

EX PARTE: DELMA BANKS, JR.

MOTION FOR INVESTIGATIVE AND
AND COURT ANALYST FUNDS

Mr. Banks is scheduled to be executed
FRIDAY, OCTOBER 30, 1992
at just past midnight

TO THE HONORABLE JUDGES OF SAID COURTS:

Comes now DELMA BANKS, JR., by and through his attorney of record, CLIFTON L. HOLMES, and files this Motion for funds, in support of which, he pleads the following:

1. Mr. Banks has this day moved the Court to compel discovery and compliance with the Texas Open Records Act. When and if this Motion is granted, Mr. Banks will be in dire need of funds for investigative assistance in going through those records. Moreover, he will need a court records analyst to help analyze the data that is found. In the event that the Motion for discovery and compliance is not granted, Mr.

Banks will still be in need of investigative assistance in determining the race of those persons on the venire sheets listed in Exhibit 3 of his Second Supplemental Application. In addition to this assistance, Mr. Banks needs the aid of an investigator in order to develop fully his allegation that the Bowie County District Attorney's office had not disclosed that a favorable deal had been arranged for Charles "Two Two" Cook, the State's chief witness, in exchange for his testimony against Mr. Banks.

2. In further support of the need for investigative funds, Mr. Banks reasserts the facts and points of law detailed in paragraphs 1-5 and 7-14 of the original Application, and in his Supplemental Applications.

For these reasons, Mr. Banks respectfully requests that his Motion be granted, and an accompanying draft Order is attached.

Respectfully Submitted,

/s/ Clifton L. Holmes
(with Expressed Consent)
CLIFTON L. HOLMES
Attorney at Law
P.O. Drawer 3267
Longview, Texas 75601

Attorney for Delma Banks, Jr.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served by hand on counsel for the prosecution:

Office of the District Attorney
Bowie County
Bowie County Courthouse
New Boston, Texas

Done this 1st day of October, 1992.

/s/ Steven Hawkins
STEVEN HAWKINS

IN THE 102ND DISTRICT COURT OF
BOWIE COUNTY AT NEW BOSTON, TEXAS

and

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN

No. ___
(Bowie County No. 80-F-86)

EX PARTE; DELMA BANKS, JR.

ORDER

The Movant, Delma Banks, is a Texas death raw inmate who is scheduled to be executed October 30, 1992. He has filed in this Court an Application for habeas relief.

On October 1, 1992, the Movant moved in this Court for funds to hire an investigator and a data analyst in order to more fully factually develop his claims to relief under *Swain v. Alabama*, 380 U.S. 202 (1965) and *Giglio v. United States*, 405 U.S. 150 (1972).

The Court finds that these claims are factually intensive enough that the requested funds are necessary for the full and fair development of the Movant's claims. The Movant's *Swain* claim carries a high evidentiary burden, and his *Giglio* claim requires investigation into facts and circumstances that occurred over a decade ago. Both claims would clearly entitle the Movant to habeas relief if proved meritorious.

THEREFORE, it is Ordered that petitioner is entitled to the reasonable expenditure of funds for investigative assistance and for hiring a data analyst.

DISTRICT JUDGE

IN THE 102ND DISTRICT COURT OF BOWIE COUNTY
AT NEW BOSTON, TEXAS

and

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN

[Filed Oct. 1, 1992]

No.___
(Bowie County No. 80-F-86)

EX PARTE DELMA BANKS, JR.

MOTION TO COMPEL DISCOVERY AND
COMPLIANCE WITH THE TEXAS
OPEN RECORDS ACT

Mr. Banks is scheduled to be executed
FRIDAY, OCTOBER 30, 1992
at just past midnight

TO THE HONORABLE JUDGES OF SAID COURTS:

Comes now DELMA BANKS, JR., by and through his attorney of record, CLIFTON L. HOLMES, and files this Motion to Compel Discovery and Compliance with the Texas Open Records Act. In support of which, he pleads the following:

1. Mr. Banks realleges the facts and points of law as set forth in his Application and Supplements in support of his claim for habeas relief under *Swain v. Alabama*, 380 U.S. 202 (1965) and Article 1, Section 3, of the Texas Constitution.

2. In order to prove his *Swain* claim, Mr. Banks requests that the Court compel compliance with his Motion for

Discovery filed March 30, 1992. Moreover, Mr. Banks requests that the Court compel the Bowie County District Attorney's Office to comply with Mr. Banks' request for access to closed case files under the Texas Open Records Act.[1] *Texas Code*, Tit. 110A, Art. 6265-17a.

3. Mr. Banks specifically seeks access to the District Attorney's strike sheets for those cases listed under Exhibit 3 in his Second Supplemental Application. In addition, Mr. Banks seeks access to any data, notes, files or any other information in the District Attorney's Office that may concern or discuss the race of those persons on the strike sheets and the venire as a whole. Such information is needed in order for Mr. Banks to be able to have a full, fair and adequate development of his *Swain* claim in this Court.

For these reasons, Mr. Banks respectfully requests that his Motion be granted, and an accompanying draft Order is attached.

Respectfully Submitted,

/s/ Clifton L. Holmes
(with Expressed Consent)
CLIFTON L. HOLMES
Attorney at Law
P.O. Drawer 3267
Longview, Texas 75601

Attorney for Delma Banks, Jr.

---

[1] On Monday, September 28, 1992, the Bowie County District Attorney's Office denied Mr. Banks' request for access to closed case files pursuant to the Texas Open Records Act. *See* Exhibit A.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served by hand on counsel for the prosecution:

Office of the District Attorney
Bowie County
Bowie County Courthouse
New Boston, Texas

Done this 1st day of October, 1992.

/s/ Steven Hawkins
STEVEN HAWKINS

APPENDIX A

September 28, 1992

Office of the District Attorney,
Bowie County
New Boston, Texas

To Whom It May Concern,

In accordance with the Federal Freedom of Information Act and the Texas Open Records Act, I am writing to review and copy portions of felony trial files maintained by the Bowie County District Attorney's Office. Specifically, I request an opportunity to review certain files created by District Attorneys Lynn Cooksey and Louis Rafaelli, and any Assistant District Attorneys working with them, from the years 1975 through 1981. All such files pertain to cases in which appeals have been exhausted.

The Texas Open Records Act holds that legal records maintained by the state become open to review after a case has exhausted its appeals.

This request is being made in connection with an immanently pending legal matter. I am an investigator assisting an attorney who has directed me, in order for his client to receive a full and fair review of his case, to write this letter of request.

Sincerely,

/s/ Tom McNeely
TOM MCNEELY
Investigator

IN THE 102ND JUDICIAL DISTRICT COURT
OF BOWIE COUNTY, TEXAS

[Filed Oct.6, 1992]

No. 80-F-86-102-C

EX PARTE DELMA BANKS,
Applicant

RESPONDENT'S ORIGINAL ANSWER

Respondent, the State of Texas, by and through its District Attorney for the 102nd Judicial District of Texas, files this its original answer in the above-captioned cause, having been served with an application pursuant to the requirements of Tex. Code Crim. Proc. Ann. Art. 11.07, Sect. 2, and would respectfully show unto the Court the following:

I.

Applicant is confined pursuant to a judgment and sentence for the offense of capital murder in Cause Number 80-F-86, wherein Applicant was convicted by a jury in the 102nd Judicial District Court of Bowie County, Texas. On October 1, 1980, Applicant was sentenced to death by lethal injection. The conviction was appealed to the Court of Criminal Appeals and the trial Court's judgment of conviction was affirmed by Opinion No. 68,933, dated November 3, 1982. Writ of Certiorari was sought in the United States Supreme Court and was denied in Opinion No. 82-6498, dated October 11, 1983.

* * * *

XVII. THE ADMISSION OF EVIDENCE OF UNADJUDICATED EXTRANEOUS OFFENSES AT THE PENALTY PHASE OF MR. BANKS' TRIAL DEPRIVED HIM OF PROBATIVES GUARANTEED BY THE CONSTITUTION.

III.

Respondent denies each and every allegation of fact made by Applicant, except those supported by official court records and those specifically admitted herein and offers the following additional reply:

REPLY TO GROUND FOR RELIEF I

(THE STATE FAILED TO REVEAL SECRET AGREEMENTS WITH ITS KEY WITNESS.)

Applicant contends the State failed to reveal a secret agreement with a witness. This contention rests upon two false assertions. First, there was no agreement; second, nothing was kept secret from the defense. The Trial record reveals defense counsel was knowledgeable of all wrongdoing that could possibly be attributible to Charles Cook and the absence of any agreement. (S.F. Vol VIII, 2148-2154). Part of the defense strategy at trial included insinuating before the jury that Cook was testifying pursuant to some sort of plea bargain arrangement.

Additionally, Cook was never a suspect in the murder of Richard Whitehead. Law enforcement officials never contemplated filing criminal charges against Cook.

In sum, there was no deal with Cook, nor was Cook a suspect in the murder. (See Exhibits, Affidavits IA-IC). Applicant's contention is without any factual basis and has no support whatsoever in the record.

* * * *

REPLY TO GROUND FOR RELIEF III

(COUNSEL FAILED TO PROVIDE MR. BANKS EFFECTIVE ASSISTANCE THROUGHOUT ALL STAGES OF THE PRE-TRIAL, VOIR DIRE AND TRIAL PROCEEDINGS.)

(COUNSEL FAILED TO INVESTIGATE MATTERS RELEVANT TO BOTH GUILT/INNOCENCE AND PUNISHMENT PHASES OF TRIAL.)

(DEFICIENCIES IN TRIAL COUNSEL'S PERFORMANCE IN PRE-TRIAL PROCEEDINGS AND JURY SELECTIONS.)

(DEFICIENT TRIAL PERFORMANCE.)

Applicant claims that he received ineffective assistance of counsel at trial and on appeal, in violation of the Sixth and Fourteenth Amendments and Article I, section 10 of the Texas Constitution.

It is now well established that claims of ineffective assistance of counsel are to be reviewed under the two-prong standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See Burger v. Kemp*, 107 S.Ct. 3110 (1987); *Darden v. Wainwright*, 106 S.Ct. 2465 (1986). The *Strickland* standard has specifically been adopted by the Court of Criminal Appeals in reviewing claims of ineffective assistance of counsel under state law. *Hernandez v. State*, 726 S.W.2d 53 (Tex.Crim.App. 1986). To meet this standard, a criminal defendant must demonstrate:

> First . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the

> defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. In reviewing such claims, "judicial scrutiny of counsel's performance must be highly deferential," *Id.* at 689, 104 S.Ct. at 2065, and every effort must be made to eliminate "the distorting effect of hindsight." *Id.* 104 S.Ct. at 2066. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and a defendant must overcome the presumption that the "challenged action 'might be considered sound trial strategy.'" *Id.*

To demonstrate prejudice the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068. When a defendant challenges the death sentence, the question is "whether there is a reasonable probability that, absent the errors, the sentence—including the appellate court, to the extent it independently re-weighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. at 2069.

It is not sufficient that the habeas petitioner merely allege a deficiency on the part of counsel; he must affirmatively plead prejudice in his petition. *Hill v. Lockhart*, 106 S.Ct. 366, 371 (1986); *Manning v. Blackburn*, 786 F.2d 710, 712 (5th Cir. 1986). Absent such pleading, a habeas petitioner is not entitled to a federal evidentiary hearing on his claim. *Id.* The claim may be disposed of for either reasonable performance of counsel or lack of prejudice, and if one is found dispositive it is not necessary that the court address the other. *Strickland*, 406 U.S. at 697,104 S.Ct. at 2069-70.

Applicant contends that witnesses who could have presented mitigating evidence at the punishment phase were not called to do so. He further asserts that his trial counsel, Lynn Cooksey, failed to adequately prepare for the sentencing hearing.

In Texas, the Adequacy of counsel's representation at the punishment phase is governed by the test enunciated in *Boyd v. State*: "The Strickland test is the proper standard to gauge the effectiveness of counsel at the guilt/innocence phase of a non-capital trial and at the guilt/innocence and punishment phases of a capital murder trial." *Craig v. State*, No. 333-90 (Tex.Crim.App. March 4, 1992), *citing Boyd v. State*, 811 S.W.2d 105, 109 (Tex.Crim.App. 1991).

When the Strickland standard is applied to the instant case, counsel is shown to have rendered effective representation.

A review of the appellate record shows that counsel's investigation was not lacking. Counsel was familiar with the facts of the case and when appropriate conducted vigorous cross-examination and voir dire of the witnesses. *Rosales v. State*, No. 69,576, slip op. at 11 (Tex.Crim.App. April 15, 1992). Not every failure to present, or even fully investigate mitigating evidence constitutes a deficiency in representation. The record provides an insufficient basis for Applicant's claim for ineffectiveness. *See Ex parte Williams*, 634 S.W.2d 815, 819 (Tex.Crim.App. 1980), *cert denied* 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982) (allegations of ineffective assistance will be sustained only if firmly founded and affirmatively demonstrated by the record).

Although the applicant implies that counsel failed to talk with and present the testimony of Witnesses, the applicant fails to name any specific available witness and to state how the testimony would have been beneficial to the Applicant. *King v. State*, 649 S.W.2d 42 (Tex.Crim.App. 1983) (failure to call witnesses does not constitute ineffective assistance of

counsel unless accused shows that the particular witnesses were available and their testimony would have benefitted the accused.)

Nevertheless, the "totality of representation" afforded the Applicant in the instant case was beyond reproach. At all times Cooksey was fully prepared for the sentencing hearing, despite allegations to the contrary. He began preparation of his punishment phase file well in advance of the actual sentencing date. Cooksey affidavit.

Responding to the allegation that Cooksey failed to present mitigating evidence from available witnesses, he stated that "after both myself and investigator Dennis Waters interviewed Mr. Banks, it was clear to us that we had all the available evidence which could even remotely be considered 'mitigating' in nature." Cooksey affidavit. Cooksey and investigator Dennis Waters investigated the case for mitigation fully cognizant of all applicable rules. The only mitigating evidence which existed was that of Applicant's character, which was fully addressed by the second special issue. Accordingly, testimony as to Applicant's good character was represented at the punishment phase of trial through the testimony of seven witnesses. Applicant's complaint that even more witnesses should have been called as to testify as to his good character is unjustified. Applicant does not demonstrate, nor do the affidavits attached to his application reflect that the testimony such witnesses would have given would not have been repetitive or duplicitous of that already presented. It is well settled that counsel is not ineffective for failure to call witnesses at either stage of the prosecution, absent a showing that (1) such witnesses were available and (2) that Applicant would have benefited from their testimony. *Byars v. State*, 691 S.W.2d 48, 54 (Tex.Crim.App. 1985); *King v. State*, 649 S.W.2d 42, 44 (Tex.Crim.App. 1983). Applicant fails to establish how repetitious testimony from dozens of witnesses who were acquainted with Applicant

could have possibly persuaded the jury that a lesser sentence was in order for a man who had already been found guilty of an execution-style slaying. For counsel to choose to present his most credible witnesses and minimize repetition is clearly reasonable under the facts of this case. The decisions included whether or not Applicant should testify and who should be called as a witness both at guilt/innocence and punishment. Applicant cannot now be heard to complain in this regard. The fact that another attorney might have pursued a different strategy will not support a finding of ineffectiveness of counsel. *Passmore v. State*, 617 S.W.2d 682, 686. (TexCrim.App. 1978).

Gauging the totality of representation afforded Applicant by Cooksey, his allegations that counsel was ineffective at the punishment phase dissolve in the absence of a showing of errors which would entitle Applicant to relief. Counsel cannot be held ineffective for failure to advance grounds which have no merit; and Applicant is not entitled to relief where he cannot demonstrate error in counsel's performance.

Applicant also alleges his appellate counsel was ineffective because counsel failed to raise a claim of ineffective assistance of counsel at trial, and sufficiency of evidence of future dangerousness that should have been raised on appeal. A defendant does not have any right to compel court appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to press those points. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). Applicant's appellate counsel, obviously exercising his reasonable professional judgment, presented numerous non-frivolous claims on appeal, including several claims Applicant feels warrant habeas relief. Any claim of ineffective assistance of counsel is simply not reflected in the record. Applicant has not met the first prong of the *Strickland* test. Even assuming arguendo, that Applicant's appellate counsel was deficient,

Applicant does not even attempt, and would be unable to demonstrate, prejudice arising from the alleged omissions, thus failing to satisfy the second prong of Strickland. Applicant's claim thus fails.

* * * *

REPLY TO GROUND FOR RELIEF IX

(THE PROSECUTORS ENGAGED IN REPEATED AND CONTINUING MISCONDUCT WHICH DENIED MR. BANKS A FAIR TRIAL.)

Applicant makes a blanket complaint of prosecutorial misconduct throughout the trial. The points listed under this ground for relief fall into two categories. Either they are covered in other replies in this answer or they are procedurally barred because no contemporaneous objection was made at time of trial.

The issue of improper jury selection was covered in Ground V. The issue of a "secret agreement' with a State's witness was covered in Ground I.

The remainder of the points under this ground should be procedurally barred based on the absence of a contemporaneous objection at trial. *Ex Parte Dutchover*, 779 S.W.2d 76 (Tex.Crim.App. 1989); *Ex Parte Banks*, 769 S.W.2d 539 (Tex.Crim.App. 1989); *Ex Parte Russell*, 738 S.W.2d 644 (Tex.Crim.App.1986).

Nothing under this ground for relief should entitle Applicant to relief.

* * * *

STATE OF TEXAS)
COUNTY OF BOWIE)

AFFIDAVIT OF WILLIE HUFF

1. My name is Willie Huff. I am over eighteen years of age and fully competent to make this affidavit. In February 1973 I was employed by the Bowie County Sheriff's Department as a criminal investigator; I served in that capacity until December 1981. I was the case officer in the capital murder case against Delma Banks. I was the officer who took the initial call, investigated the case, testified at trial and assisted with the security arrangements for Delma Banks during his trial.

2. Charles Cook was never a suspect in the murder of Richard Whitehead.

3. There was no deal, secret or otherwise, with Charles Cook.

/s/ Willie Huff
WILLIE HUFF

Sworn and subscribed to before me this 12th day of October, 1992.

/s/ Michele Morgan
MICHELE MORGAN
Notary Public in and for
Bowie County, Texas

My Commission Expires:
5-28-95

STATE OF TEXAS)
COUNTY OF BOWIE)

AFFIDAVIT OF JAMES ELLIOTT

1. My name is James Elliott. I am over the age of eighteen and fully competent to make this affidavit. I am an attorney licensed to practice law in the State of Texas. I became an Assistant District Attorney for Bowie County on January 22, 1979. I was co-counsel in the capital murder case of the State of Texas vs. Delma Banks.

2. I am aware of all facts concerning the investigation and prosecution of Delma Banks.

3. There was no secret agreement with Charles Cook in exchange for his testimony.

4. I am unaware Charles Cook was ever considered a suspect in the murder of Richard Whitehead.

/s/ James Elliott
JAMES ELLIOTT

Sworn and subscribed to before me this 12th day of October, 1992.

/s/ Michele Morgan
MICHELE MORGAN
Notary Public in and for
Bowie County, Texas

My Commission Expires:
May 28,1995

THE STATE OF TEXAS)
COUNTY OF TARRANT)

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day, personally appeared KEVIN A. BYRNE, who being duly sworn; deposed as follows:

"My name is Kevin A. Byrne. I am over the age of eighteen (18) and fully competent to make this affidavit. I am an attorney licensed to practice law in the State of Texas. I was an Assistant District Attorney in Dallas County, Texas, in June of 1981. I was apparently the prosecuting attorney on the case styled *State of Texas v. Charles Edward Cook*, Cause No. F81-2140-P. I have no recollection whatsoever of any pre-arranged plea bargain with Mr. Cook, wherein a 'deal' was cut with Mr. Cook in exchange for his testimony in the case styled *State of Texas v. Delma Banks*."

/s/ Kevin A. Byrne
KEVIN A. BYRNE

SUBSCRIBED AND SWORN TO BEFORE ME on this 12th day of May, 1992.

/s/ Christi L. Dyson
CHRISTI L. DYSON
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission Expires:

Exhibit A

STATE OF TEXAS)
COUNTY OF BOWIE)

AFFIDAVIT OF DENNIS WATERS

1. My name is Dennis Waters. I am over the age of eighteen and fully competent to make this affidavit. I am currently a licensed private investigator. I began my career in law enforcement in 1969 working for Texas Department of Public Safety. I held that position til 1975. From approximately 1975 to 1977 I served in the position of appointed constable in Bowie County, Texas. I have also served as a law enforcement officer for Hooks and Nash. I have held the position as city judge for Nash.

2. I was employed as private investigator for Mr. Lynn Cooksey in the capital murder case of the State of Texas vs. Delma Banks. I interviewed Delma Banks several times prior to his trial. He was extremely uncooperative. When asked about the facts of this case he would simply tell me he hitchhiked from Nash to Dallas in one hour and fifteen minutes in the rain. When told this was physically impossible he stated, "The Lord will take care of me." At one point he agreed to submit to a polygraph test pursuant to an agreement between the State and the defense. When told his mother could not be present, he refused the test.

3. At no time did Delma Banks appear to be brain damaged or impaired in any way he appeared to understand the questions asked of him and was aware of the importance of his answers when he chose to give answers.

4. As investigator, I visited the crime scene and made photographs with Mr. Cooksey. I interviewed many of the State's witnesses and did background investigations of them.

5. I also secured and interviewed witnesses who agreed to testify on Mr. Banks behalf at trial. I was not told of any rash

or allergy by Delma Banks or any member of his family. The only evidence I found that could possibly be used on his behalf were the character witnesses. These witnesses were interviewed at Demetra Banks home and at law office of Lynn Cooksey.

/s/ Dennis Waters
DENNIS WATERS

Sworn and subscribed to before me this 13th day of October, 1992.

/s/ Michele Morgan
MICHELE MORGAN
Notary Public in and for
Bowie County, Texas

STATE OF TEXAS)
COUNTY OF BOWIE)

AFFIDAVIT OF LYNN COOKSEY

1. My name is Lynn Cooksey. I am over the age of eighteen and fully competent to make this affidavit. I am an attorney licensed to practice law in the State of Texas. I received my law license in 1967. From 1967-1978 I served as the District Attorney of Bowie County, Texas.

2. The decisions made and actions taken on behalf of Delma Banks were the result of my professional judgment. My presentation of Delma Banks' defense was based on the trial strategy I chose to put forward on his behalf.

3. It did not appear to me that Delma Banks suffered from any brain damage or mental impairment whatsoever. He understood the questions asked and gave appropriate answers. I did not recommend any type of psychiatric exam because I perceived nothing that would indicate such was needed.

4. No mention was made of any rash or allergy that would account for or in any way affect the behavior of Delma Banks. At trial I brought these witnesses forwarded in such numbers and in a fashion I believed would most help Delma Banks. I believe the record would reflect I consulted with my client on these matters.

5. I specifically deny the allegations of professional misconduct which have been leveled against me. In particular, I did not attempt to persuade Mrs. Banks to testify falsely concerning the whereabouts of her son on the night of the murder of Richard Whitehead.

/s/ Lynn Cooksey
LYNN COOKSEY

SWORN AND SUBSCRIBED TO BEFORE ME, this the 30th day of December, 1992.

/s/ Becky A. Schobey
BECKY A. SCHOBEY
Notary Public, State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed Mar. 7, 1996]

No. 6:96cv220

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
THIS IS A CAPITAL CASE
Mr. Banks is scheduled to be executed
Friday, MARCH 15, 1996

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DELMA BANKS, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

No. ___

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

THIS IS A CAPITAL CASE
Mr. Banks is scheduled to be executed
Tuesday, MARCH 15, 1996

DELMA BANKS, Jr., an indigent prisoner confined on death row in the Texas Department of Criminal Justice, Institutional Division, by and through counsel, petitions this Honorable Court for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 *et seq.*

* * * *

My vote for the imposition of a death sentence in this case stemmed directly from my religious convictions. Foremost in my mind during deliberation, was a particular Old Testament passage in which God warns the children of Israel about polluting themselves by associating with people of other persuasions. God specifically calls for the execution of one man who takes

for himself a woman of a neighboring community. This biblical passage convinced me of the necessity of the death penalty in Delma Banks' case.

HPr. Exhibit S. Given that Mr. Banks had befriended the white youth he was convicted of killing, the import of Ms. Wyant's statement is clear. She sentenced Mr. Banks to death based on her belief that racial inter-mixing — "associating with people of other persuasions" — must be punished by death.[4]

96. Additionally, during the jury's delibrations at the sentencing phase of Mr. Banks' trial, the jurors decided that Mr. Banks would be paroled and would likely commit armed robberies if released. HPr. Exhibit P & Q. Based upon the belief that such parole would in fact occur, at least one juror decided to vote for a death sentence rather than a life sentence. *Id.*

III. RESPECTS IN WHICH MR. BANKS' RIGHTS HAVE BEEN VIOLATED

97. Mr. Banks has been convicted and sentenced to death in violation of the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in the following respects:

A. *Ineffective Assistance of Counsel at Trial*

98. Trial counsel's numerous errors and omissions at both phases of the capital trial denied Mr. Banks his Sixth and Fourteenth Amendment rights to effective assistance of counsel. These errors and omissions, singly and collectively, resulted in representation well below that required by

[4] In the state post-conviction hearing, Ms. Wyant did not deny the fact that she made this statement. She claimed only that she was duped into making it. But as the document itself shows, Ms. Wyant initialed the statement, read it thoroughly, and even added an additional statement.

contitutional standards and actual prejudice to Mr. Banks at each phase of his trial. Counsel's errors and omissions include, but are not limited to, the following:

Pre-Trial Phase

99. Trial counsel failed to make sufficient preparation for trial in a number of key respects.

100. Counsel failed to conduct a constitutionally adequate investigation into both the state's case against Mr. Banks and possible defenses that could be asserted on Mr. Banks' behalf. This lack of investigation left the defense woefully unprepared to confront the state's case against Mr. Banks, and to assert a defense on his behalf.

101. Though retained soon after Mr. Banks was arrested, Mr. Cooksey failed to use the months before trial to pursue the most basic investigation. He did not visit the park where the body of the deceased was found, and thus had no idea what the area looked like. Tr. 2003-4. The park lay less than five miles from Cooksey's office. Because he had never bothered to make that five-minute drive, Cooksey was unable at trial to effectively cross-examine the State's witness who presented photographs of the scene. Cooksey complained that he was "surprised" by their introduction. *Id.*

102. Most of trial counsel's few motions were filed on August 15, 1980. Tr. 16-32. Virtually none of those motions were taken up by the court until September 22, 1980, the same day that jury selection started. Tr. 7. One of the motions decided at that time was a discovery motion. Tr. 24. Of course, with the beginning of the trial imminent, any information gained through the motion could not have been used meaningfully to develop or inform defense strategy. Trial counsel simply did not follow up on even his own motion for discovery to try to prepare for this case.

103. Counsel also failed to uncover facts that were essential to the successful prosecution of motions filed and heard pretrial. For example, despite extensive pretrial publicity, Mr. Cooksey offered no evidence, save Mr. Banks' testimony, regarding the extent of the publicity. Not one newspaper article or radio broadcast was placed into evidence. Mr. Banks was prejudiced by the absence of proof supporting this motion.

104. Counsel also failed to question prospective jurors about their exposure to pretrial publicity, and whether they had learned of, or formed opinions about, the alleged facts and circumstances of Mr. Banks' case.

105. Additionally, as described in paragraphs 100-103 *supra*, counsel failed to adequately investigate the case and follow up on leads that demonstrated that Mr. Banks may not have committed the murder. These and other omissions and errors left counsel wholly unprepared to begin trial on September 29, 1980.

Guilt Phase

106. Trial counsel's lack of readiness was evident from the beginning of the trial proceedings, and continued throughout. While knowing that the racial nature of the crime could weigh heavily on the minds of an all-white jury, counsel made no effort to insure that members of the African-American community were represented on the jury. In fact, when Mr. Banks told Mr. Cooksey that he wanted blacks on the jury, Mr. Cooksey wrote him a note acknowledging that the prosecutor would strike all blacks, and yet, inexplicably, failed to object to the state's practice.

107. Counsel neither acquainted himself with the facts the State would attempt to prove at the guilt phase, nor prepared to highlight the many inconsistencies and gaps in the State's case through cross-examination. Mr. Cooksey's cross-examination of key State's witnesses was not reasonably

adequate. For example, the state's "proof" on the important issue of the time and date of death was allowed to stand unimpeached because Mr. Cooksey cross-examined neither the medical examiner nor the witness who heard two sounds early in the morning with the autopsy report that showed a significantly different time of death. No reasonable tactical or strategic reason can explain counsel's utter failure to investigate, explore through cross-examination, or highlight in closing argument the disparity between the autopsy report's indication of the date of death and the allegations of the state.

108. Additionally, the facts of Mr. Banks' alleged admission of having committed the homicide, as recounted by Mr. Cook, varied significantly from the known and demonstrable facts, but defense counsel never brought these discrepancies to the jury's attention. Nor did counsel challenge the other parts of Cook's story that were ripe for cross-examination. For example, Cook never explained, because he was not asked, why he allowed a stranger he believed to have committed a murder to stay in his family's home.

109. Counsel also neglected to challenge the prosecutor's repeated and demonstrably false assertion that the facial gunshot wound to the deceased had been fired "right between the eyes." That description utterly misrepresented the facts as revealed in the autopsy report. Had counsel demonstrated otherwise, such a juror could have concluded that the physical evidence did not support a finding of cold-blooded "deliberateness."

110. Several times during voir dire, trial counsel told prospective jurors that if the defendant testified at a criminal trial, he waived the ability to challenge the sufficiency of the evidence to support the conviction. That was simply an incorrect statement of the law. In fact, the law at that time was

that if a defendant moved for a directed verdict of acquittal at the close of the State's case and then testified, he waived the right to challenge the court's denial of the motion.

111. While the jury's understanding of the law in this area may not have been dispositive, Mr. Cooksey's misunderstanding of it undoubtedly reflects the advice he likely gave to Mr. Banks about not testifying. Mr. Banks, who testified at the punishment phase of his trial, offered a credible explanation for his actions and said that he had not committed the murder. Such information would have certainly been relevant and quite significant for the jury to have when evaluating his guilt. The only reasonable explanation for Mr. Banks' not testifying is that his attorney made a mistake of law that determined the advice he gave his client; counsel's faulty advice interacted with Mr. Banks' mental deficit (*see infra*) to deprive Mr. Banks of his constitutionally guaranteed right to tell the jury what had happened on the night of the offense.

112. In addition, after carefully examining his client in the judge's chambers regarding his understanding of his right not to trestify, Mr. Cooksey then inexplicably emphasized that failure to the jury by announcing in open court that the defendant was not testifying on counsel's advice. Tr. 2259.

113. Counsel made no opening statement, giving up the opportunity to provide the jury with any defense theme. Furthermore, counsel failed to present any defense on Mr. Banks' behalf despite existence of inconsistencies and misrepresentations in the state's case. As demonstrated in paragraphs 106-109 above, many significant facts, which would have directly challenged the state's version of events, could have been offered. Finally, counsel's performance during the closing arguments was not effective. His closing argument fell below any professional standard of reasonableness. He also failed to object to numerous misstatements and improper arguments by the prosecution.

Penalty Phase

114. With respect to the penalty phase, moreover, counsel presented few potential mitigation witnesses, despite the availability of a substantial number. Counsel then compounded his failure by not bothering to prepare the handful of witnesses he actually placed on the stand. But for these omissions and errors, Mr. Banks would not have been sentenced to death.

115. Counsel failed to make any meaningful investigation of the state's evidence of future dangerousness. Although counsel was aware of the extenuating circumstances surrounding the state's insinuation that Mr. Banks "pistol-whipped" Vetrano Jefferson, he made no effort to present the evidence from Vetrano's sister which would have refuted the state's contention. Demetra Jefferson's account would have created a dramatically different impression of Mr. Banks than the jury actually received. Given Mr. Banks' youth and complete lack of any prior criminal record, and the extreme weakness of the state's case at punishment in any event, this error alone compels the conclusion that the outcome of the punishment phase would have been different if counsel had acted reasonably and called Demetra Jefferson to testify.

116. Despite his suspicions, which are apparent from the record, and the background facts which were available in a simple interview of Mr. Banks' family members, counsel did not ask to have Mr. Banks evaluated by any mental health professionals, nor did he seek expert assistance in understanding or describing Mr. Banks' limitations to the jury. Expert witnesses are critical in many capital cases. Without their assistance, the sentencing jury may be — as the jury unquestionably was in this case — deprived of a mitigating explanation for otherwise unexplainable behavior.

117. Counsel also failed to make any investigation for mitigating evidence to present as reasons to reject imposition

of a death sentence. Counsel took no social history from Mr. Banks or from his family and conducted no search for mitigating witnesses. Had counsel conducted such an investigation, they would have found an extraordinary array of factors and circumstances in Mr. Banks' past life that would have shown a sentence of death to be excessive punishment. Counsel had no strategic reason for not conducting or presenting such evidence. In fact, he even told Mr. Banks that it would be inadvisable for him to call all the mitigating witnesses that he did have. With his client's life on the line, trial counsel did not want to let the jury hear all of the people who were prepared to tell them that Mr. Banks should live. Worse, counsel did not know any of the people he called. They were only present in court because counsel had implored Mr. Bank's mother to call them late the previous night, after Delma had been convicted, and ask them to testify. Thus, Mr. Cooksey at that late date could neither fully investigate their potential testimony or use his expertise, such as it was, to determine how best to present it.

118. Even with respect to those defense witnesses who *did* testify, counsel's examination was inept and defeated the purpose of calling them. His examinations were very brief and did not begin to plumb the depths of the knowledge of Mr. Banks that these people, such as one of his teachers and his employer, should have had.

119. This failure alone shows a harmful violation of the right to effective assistance of counsel. Had even part of the mitigating evidence set out above been developed and effectively presented, no humane sentencer would have returned a verdict of death. Had the jury known of the tragedy that marked Mr. Banks' life, its view of the state's evidence would without question have been different, and its treatment of Mr. Banks more compassionate.

120. Counsel also failed to object to numerous improper and highly prejudicial remarks made by the prosecution during its closing argument at the penalty phase. The argument was a studied attempt to secure a death sentence by inflaming the jury with prejudicial considerations. The prosecutor made prejudicial remarks that the Bible and religion sanctioned and mandated the death penalty in this case. These and other offensive remarks were improper and harmful, and injected highly irrelevant considerations before the sentences. Counsel made no objection to any of them.

121. Trial counsel's final address to the jury was hopelessly ineffective. He spoke a mere seven minutes, during which he agreed with the state that Mr. Banks "did a terrible thing." Tr. 2414. His positive comments about Mr. Banks did not even cover all of the information given by the defense witnesses.

122. For these and other reasons apparent in the record, Mr. Banks failed to receive the effective assistance of counsel at either phase of his capital trial. But for this substandard performance, there is a reasonable likelihood that the result of each phase would have been different.

* * * *

I. *Repeated and Continuing Prosecutorial Misconduct*

147. Several acts by prosecutors in Mr. Banks' case distorted the truth-seeking function of the trial and deprived him due process of law. Their actions including, but by no means limited to those examples which follow, deprived Mr. Banks of rights guaranteed him by the Fourteenth Amendment.

148. The prosecutors purposefully utilized inflammatory and materially misleading jury argument at both phases of trial. At the guilt phase, the prosecutors' misconduct included a litany of references to their personal belief in the strength of

the State's case. Tr. 2269 ("I'm proud of what Deputy Willie Huff found . . . . To begin with, he brings us the truth and like I said, this is a search for truth"); *id.* ("he went a step further and he solved for us one of the questions we have to answer"); 2270 ("Aren't we glad that we've got experts to help us find out the truth about these matters?"); id. ("Aren't we thankful that we have the resources so that we can afford to bring something like this to light and find out the truth about it?"); *id.* ("Defense has no questions of Willie Huff. They didn't want any part of him, because he came loaded. He had the truth."); *id.* ("in order to bring you the whole truth, we call [sic] as our witness Marcus Jefferson"); 2271 ("I ask you to search your memories and recall the testimony and see if you can discern any reason why these people would falsify for vengeance [sic] or for advantage or to save their hides. I didn't see any."); 2272 ("murder and truth will always out, folks. They might stay hid for a while, but eventually if good people work long enough and hard enough, the truth is going to come out, and it did"); 2273 ("We take our witnesses and we take the proof as it is given to us as we find it and as we search for it. That's the truth about this matter. Charles Cook brought you absolute truth") (emphasis added); 2276 ("Mr. Cooksey pointed his finger at him in numerous ways, but Charles Cook didn't budge from the truth, and that's ample evidence that Charles Cook is telling the truth: That doesn't lie"); 2277 ("He [Whiteurs] told you the truth"); 2281 ("You know he [Whiteurs] told the truth").

149. This repeated practice of vouching for the credibility of its witnesses along with the insistence that the State witnesses were telling the "truth," denied Mr. Banks a fundamentally fair trial as guaranteed by the Sixth and Fourteenth Amendments

150. Further, the prosecutors' guilt-phase closing arguments contained other impermissibly inflammatory arguments that deprived the proceeding of fundamental fairness

See e.g., Tr. 2303 ("We may as well burn this courthouse down and go away if we come up with any other verdict other than guilty of capital murder, because there will be no justice in Bowie County"); ("I want you to go from this place proud and holding your head high. I do not want you to be ashamed of what you have done here, and if you do not return a verdict of guilty, you will be ashamed"). The prosecutors also, time and again, urged the jury to consider the feelings of the victims' families in determining Mr. Banks' *guilt*. Tr. 2267 (discussing the grief of the deceased's father); 2268 (describing the deceased's stellar character); 2270 (urging jury to weigh the "rights" of the deceased in determining guilt); 2278 (deploring that the deceased will "never see our rain" or "feel the warm sunshine on his cheeks"). While some such argument might, within Constitutional limits, be permitted at the punishment phase, each of these passages occurred during the guilt-phase argument. As a result, Mr. Banks' guilt was measured in large part not by the strength of the prosecution's evidence, but by the perceived tragedy of the victims' deaths. This misconduct, too, demands that Mr. Banks' conviction be reversed.

151. One additional argument made during the guilt-phase closing argument also warrant *habeas* relief:

> If there is one thing in this case about which there is absolutely no doubt, it is the identity of Delma Banks. He has been identified to the point that his hide could be recognized in a tannery.

Id. at 2266. This "colorful" analogy was designed to focus the jury's attention on the *color* of Mr. Banks' "hide," and the difference between his color and that of his alleged victim. This racist tirade alone requires the reversal of Mr. Banks' conviction.

152. Further, the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 363

U.S. 83 (1963). This evidence included information that pointed to another suspect in the murder, information that linked prosecution star witness Charles Cook to Robert Farr and to Texarkana generally, and information that would have revealed Robert Farr as a police informant and Mr. Banks' arrest as a "set-up." This evidence was material to guilt and its disclosure to the jury could well have resulted in Mr. Banks' acquittal; the prosecution's determined concealment of the evidence deprived Mr. Banks of due process of law and a fundamentally fair trial.

153. Additionally, the case against Mr. Banks turned largely on the pivotal testimony of one witness: prosecution witness Charles "Two-Two" Cook. It cannot be disputed that the testimony of Charles "Two-Two" Cook was the focus of the State's case at the guilt phase of Mr. Banks' trial, as is evident from the amount of time devoted to it in the closing arguments of both sides. See Tr. 2272-2276, 2281-2291, 2294, 2297-3000. Likewise, Cook's credibility was as critically important as the content of his testimony; if the jury believed him, they would probably convict Mr. Banks. Further, if they convicted Mr. Banks, they would probably return an affirmative answer to the second special issue, because of Cook's damning allegation that Mr. Banks acknowledged having killed the victim "for the hell of it." As a result, the prosecutors' actions in concealing from the jury Cook's enormous incentive to testify in a manner favorable to the State require that this Court reverse Mr. Banks' conviction and sentence. The prosecution's failure to disclose that Cook stood to profit so enormously by his testimony, narrowly evading a possible life term in prison, requires the reversal of Mr. Banks' conviction and sentence of death.

154. The prosecution engaged in improper conduct by appealing to the jury on religious grounds at the guilt and sentencing phases of Mr. Banks' trial. This irresponsible and impermissible evocation of religion had its desired prejudicial

effect. It signaled to juror Wyant that her misguided and racially intolerant religious beliefs could direct her decision. Her statement also reveals that the jury was led in collective prayer by the jury foreman. HPr. Exhibit S. A capital sentencing jury operating under the belief, introduced and nurtured by the prosecution, that it is working hand-in-hand with God is particularly objectionable. There is the "intolerable danger" that jurors will minimize the importance of their role in deciding the fate of the accused by, in effect, seeing themselves as merely God's agents.

155. Finally, the prosecution's argument that it was not within the jury's power to consider mercy was improper.

156. The cumulative effect of the prosecutors' multifarious violations of rights guaranteed to Mr. Banks by the federal Constitution was to deny him a fundamentally fair trial. Mr. Banks' conviction and sentence must be overturned.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed June 12, 1998]

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

MOTION FOR LEAVE TO CONDUCT DISCOVERY

DELMA BANKS, JR., by and through counsel, respectfully moves this Court pursuant to Rule 6 of the Rules Governing Cases Brought Under 28 U.S.C. § 2254, for leave to conduct discovery as specified below.

A. *Introduction*[1]

1. This is a habeas corpus proceeding filed by an indigent state prisoner. The petitioner, Delma Banks, is a capitally-sentenced inmate who has asserted in his petition for wit of habeas corpus numerous grounds upon which his conviction and death sentence stand in violation of the Constitution of the United States.

2. Discovery is necessary to make available to Mr. Banks facts that are crucial to proving his ineffective assistance of counsel and prosecutorial misconduct claims. The information requested is not otherwise available. Mr. Banks is entitled to discovery because there are factual disputes that, if resolved in his favor, would entitled him to relief. Additionally, as set forth in the Motion for Evidentiary Hearing submitted herewith, Mr. Banks was not afforded a full and fair evidentiary hearing in state court. The requested discovery is warranted in order for Mr. Banks to set forth fully his right to an evidentiary hearing before this Court.

[1] *See* Petition for Writ of Habeas Corpus for the background facts underlying this Motion for Leave to Conduct Discovery.

3. The limited discovery which petitioner seeks is necessary and reasonably calculated to lead to admissible evidence in connection with two of petitioner's claims:

(A) that petitioner received ineffective assistance of counsel in that trial counsel (i) failed to adequately challenge the testimony of the state's key witness, Charles Cook, (ii) and failed to challenge Willie Huff's credibility; and

(B) that the state failed to (i) reveal its secret agreement with its key witness, Charles "Two-Two" Cook, (ii) reveal that Robert Farr was a police informant, and (iii) reveal that Mr. Banks' arrest in Dallas was the result of a "set-up."

B. *This Court Should Permit Petitioner To Conduct Limited Discovery*

4. The state's most important witness was Charles Cook. 8 R 1959. Much of the state's evidence of guilt—Mr. Banks' alleged extrajudicial "confession," his alleged presence in Dallas driving Whitehead's car—came before the jury through the testimony of one witness: Charles Cook.

5. Mr. Cook's credibility and veracity were important issues for the jury. The state acknowledged that Cook had an extensive criminal record and that at the time of the trial, Cook had been incarcerated for 113 days in Dallas County pursuant to an indictment for arson for setting his sister's

house on fire. 8 R 2114-2115.[2] What the jury did not know was that Cook was testifying pursuant to a generous "deal" cut with the prosecutors—a deal that called for dismissal of charges then pending against Cook.[3] The prosecutors' determined concealment of information critical to the jury's assessment of Cook's credibility denied Mr. Banks his rights under the Sixth and Fourteenth Amendments. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

6. The "deal" Cook made with the State had two parts. First, in return for his testifying against Mr. Banks in a manner favorable to the prosecution, the prosecution agreed not to charge Cook as an accessory to the Whitehead murder. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. II, at 18 (affidavit of Patrick DeLaune re Charles Cook). Second, Texarkana prosecutors agreed to secure the dismissal of an arson charge pending against him in Dallas on condition that he inculpate Mr. Banks in the Whitehead killing. At the time of trial, Cook was a parolee from the Texas prison system. Despite the fact that the victim of the arson was Cook's sister, and that she had stated under oath that she did not wish to continue to pursue the charge against Cook, state authorities

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[2] The State further acknowledged that the arson case should be tried given the length of time Cook had been incarcerated. 8 R 2151.

[3] During Mr. Banks' trial, on cross-examination, Mr. Cooksey attempted to reveal Cook's bias by questioning him about the pending arson charges:

> Cooksey: Have you been indicted for arson?
> Cook: Yes, sir.
> Cooksey: Did they put the habitual criminal act on you?
> Cook: Yes, sir.
> Cooksey: And they got you where you've got to testify, haven't they, Mr. Cook?
> Cook: No, sir.

9 R2154.

refused both to dismiss the charges or release him prior to Mr. Banks' trial. *Id.*, Vol. II, at 21 (Dallas Court Records of Charles Cook). Indeed, rather than dismissing the charges, the Dallas prosecutors enhanced the charges two months before Mr. Banks' trial by alleging that Cook was a habitual offender—exposing him to a possible sentence of life imprisonment. *Id.* Fortunately for Cook, his testimony against Mr. Banks in Texarkana promptly *and fully* accomplished what his sister's pleas could not; only days after he testified against Mr. Banks in Bowie County, all charges against him in Dallas were dismissed and he walked out of the Dallas County jail a free man.[4] *Id.* These circumstances virtually compel the conclusion that the Bowie County prosecutors bargained for Cook's testimony, and agreed to have Dallas authorities dismiss the pending charges against him in return for his cooperation.

7. Robert Farr testified on behalf of the state at both the guilt and punishment phases. His testimony included description of a trip he took with Mr. Banks and Marcus Jefferson to Dallas on April 23, 1980, the evening Mr. Banks was arrested. During cross examination, defense counsel asked Farr whether he had tipped off lead investigator Willie Huff about his trip to Dallas with Mr. Banks.[5] 9 R 2326-2327. He

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[4] One year later, Cook cited his stellar performance for the state in a letter he wrote to a judge in Dallas asking for a favorable recommendation to commute a six year sentence he received, subsequent to Mr. Banks' trial, after pleading guilty on July 7, 1981, to the offense of passing a forged instrument. He wrote:

> I Charles Edward Cook testerfive [sic] for the State in a capital murder trail [sic] in Bowie County in 1980. I was taken to Texakana, Texas [sic] from the Dallas county jail by Sheriff Willie Huff. I did a very good job for the State, me and my wife. The suspect (Delma Banks Jr) recive (sic) the death penalty.

Ex parte Banks, Application No. 80-F-86-102-C, Vol. 11, at 21.

[5] Willie Huff had testified at the Examining Trial on May 21, 1980 that he had received a telephone call from a confidential informant who

also asked Farr whether he had ever taken money from the police and whether the police had promised him anything. Farr answered all these questions in the negative. 8 R 2105.

8. Although Robert Farr denied working for the police to build a case against Mr. Banks, evidence exists that Farr was in fact a police informant and that he "set-up" Delma's arrest in Dallas. First, Demetra Jefferson knew that Robert Farr illegally obtained prescription drugs and had served as a snitch for law enforcement agencies. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. II, at 134 (affidavit of Rob Owen re Demetra Jefferson). Second, Gary Owen, a former police officer with the Arkansas Police Department, testified at trial that he had used Farr as an informant. 9 R 2379-2383. Finally, Willie Huff's testimony at the Examining Trial held on May 21, 1980, confirmed that he received a telephone call from a confidential informant who told him that Mr. Banks was going to Dallas. Statement of Facts from Examining Trial, at 15.

9. Mr. Banks respectfully requests that the Court grant leave to allow his counsel to seek depositions and/or the production of documents and physical evidence as follows:

(A) All documents in possession of the Federal Bureau of Alcohol, Tobacco, and Firearms, the Texas Department of Public Safety, the Bowie County Sheriff's Office, the Bowie County Jail, the Texarkana Texas Police Department, the Texarkana Arkansas Police Department, the Dallas Police Department, the Miller County Sheriff's Office, the Miller County District Attorney's Office, the Dallas County District Attorney's Office, the Bowie County District Attorney's

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informed him that Mr. Banks was going to Dallas to obtain a weapon. Statement of Facts of Hearing on Examining Trial, May 21, 1980, at 15-16. The District Attorney vigorously objected to Mr. Cooksey's questioning of Willie Huff regarding the identity of his confidential informant. *Id.* at 24-27.

Office, the Bi-State Justice Center, and/or the Bi-State Information Center regarding Robert Farr's record of service as a police informant, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge concerning Robert Farr's services as a police informant.

(B) All documents in the possession of the Texarkana, Texas Police Department, the Bowie County Sheriff's Office, the Bowie County Jail, the Dallas Police Department, the Bi-State Justice Center, the Bi-State Information Center and/or the Texas Department of Public Safety concerning the circumstances and facts relating to the shooting of Richard Whitehead and the investigation thereof, and depositions of police officers involved in Mr. Banks' arrest on April 24, 1980, including L.R. Cadena and H.K. Sanders, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge concerning Mr. Banks' arrest.

(C) All documents in the possession of the Bowie County Jail, the Dallas County jail, the Bi-State Correctional Facility, and the Texas Department of Criminal Justice identifying the prison personnel on duty during Charles Cook's incarceration from May 14, 1980 through October 2, 1980 and/or relating to his behavior during his incarceration, and depositions of prison personnel with responsibility for Mr. Cook during his incarceration from May 14, 1980 through October 2, 1980, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge of Mr. Cook's incarceration.

(D) All personnel records regarding Willie Huff in the possession of the Bowie County Police Department, the Bowie County Jail, the Texarkana Texas Police Department (including the Narcotics Task Force), the Texas Department of Public Safety, the Texas Commission on Law Enforcement and Officer Safety, the Bowie County District Attorney's Office, and/or the Bowie County Sheriff's Department, including any information regarding promotions, demotions, suspensions, disciplinary records, complaints, and/or internal affairs investigations, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge of Mr. Huffs' personnel record.

(E) All records, reports, investigative reports, or notes regarding Willie Huff in the possession of the Bowie County Police Department, the Texarkana Texas Police Department, the Bowie County Sheriff's Department, the Texas Rangers, the Bowie County District Attorney's Office, and/or the Dallas County District Attorney's Office and depositions of individuals with responsibility for investigations of Willie Huff, and if necessary, the deposition of the custodians of records of such departments and offices regarding the location of such documents, and the deposition of employees or agents of such departments and offices with knowledge of Mr. Huffs' record.

(F) All training manuals and policy statements regarding the exercise of prosecutorial discretion as to (1) when to reindict an individual as an habitual offender and (2) information regarding when and how police and prosecutors suspected of abusive law enforcement practices are investigated and disciplined, and/or deposition of any and all individuals in the Dallas County District Attorney's Office and the Bowie County District Attorney's Office with knowledge of the above-mentioned policies.

10. Mr. Banks is plainly entitled to these materials. Rule 6 of 28 U.S.C. § 2254 states in part:

> [a] party shall be entitled to invoke the process of discovery available under the Federal Rule of Civil Procedures and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

11. The United States Supreme Court in *Harris v. Nelson*, 394 U.S. 286, 290, 89 S.Ct 1082, 1086 (1969), set forth the standard governing the exercise of the Court's discretion with respect to such discovery requests.

> We do not assume that the Courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them . . . . But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally, and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

12. The Court's recent reversal of a lower court's refusal to permit discovery to a habeas petitioner confirms Mr. Banks' entitlement to the requested discovery. *See Bracy v. Gramley*, 138 L.Ed.2d 97 (1997). In *Bracy*, the petitioner alleged his trial judge had taken bribes in other cases and held bias against him. As the judge had recently been successfully prosecuted for extortion and racketeering, *Bracy* generally sought access to the federal prosecutor's investigative file to develop evidence that would show "he was denied a fair trial because 'in order to cover up the fact that [the trial judge] accepted bribes from defendants in some cases, [the judge] was prosecution oriented in other cases.'" 138 L.Ed.2d at 102 *quoting in part United States ex rel. Collins v. Welborn*, 868 F.Supp. 950, 990 (ND Ill. 1994). The court of appeals had

denied discovery, reasoning that Bracy had failed to show "good cause." But because Bracy, like Mr. Banks', pointed to specific circumstances that suggested further proof of the judge's bias might well be uncovered if discovery was granted, the Court held that the district court abused its discretion in not granting the requested discovery.

13. *Bracy* reconfirms that discovery is warranted when it is "indispensable to a fair, rounded, development of the material facts." *East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995). *See Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996) (petitioner entitled to discovery when there is a factual dispute that would entitle her to relief and if state has not afforded her a full and fair evidentiary hearing); *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (denial of discovery was an abuse of discretion when discovery was necessary to fully develop facts in support of claim for relief); *Gaitan-Campanioni v. Thornburgh*, 777 F. Supp. 1355, 1356 (E.D. Tex. 1991) ("court should not hesitate to allow discovery where it will help illuminate issues underlying applicant's claim"). Access to discovery is necessary for Mr. Banks to fully develop facts in support of his claims and in support of his request for an evidentiary hearing. *See East v. Scott*, 55 F.3d at 1002 (court granted discovery and stated that court should defer ruling on request for evidentiary hearing until after discovery completed).

14. Mr. Banks respectfully submits that the limited discovery he seeks is appropriate and necessary, and is likely to lead to relevant and admissible evidence in support of the aforementioned claims. Moreover, Mr. Banks respectfully submits that the aforesaid discovery also is necessary in order to afford him a fair opportunity to present all facts relevant to his application for an evidentiary hearing.

15. Counsel represents that we will conduct such discovery expeditiously and without imposing unreasonable or undue burdens on the parties, or on the police and other state

officials and individuals from whom the discovery is requested. Counsel further represents that we will attempt in good faith to resolve any discovery disputes which may arise without resort to judicial intervention.

* * * *

WHEREFORE, Mr. Banks hereby respectfully requests that the Court allow 90 days for the completion of discovery and an additional 30 days thereafter for counsel to supplement his motion for an evidentiary hearing.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed June 16, 1998]

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.

Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

MOTION FOR AN EVIDENTIARY HEARING

DELMA BANKS, JR., by and through counsel, respectfully submits his motion, pursuant to former 28 U.S.C. § 2254(d), and seeks an evidentiary hearing on (i) claims alleged in his petition concerning ineffective assistance of counsel and prosecutorial misconduct, as well as (ii) to supplement the record with regard to his claim based upon *Swain v. Alabama*, 380 U.S. 202 (1965), and to, if necessary, (iii) show sufficient reasons exist to excuse any procedural defaults in the state courts. In support of this motion, Mr. Banks states as follows:

1. This is a habeas corpus proceeding filed by an indigent state prisoner. The petitioner, Delma Banks, is an indigent capitally sentenced inmate who has asserted in his petition for writ of habeas corpus numerous grounds upon which his conviction and death sentence stand in violation of the United States Constitution.

2. Mr. Banks' right to an evidentiary hearing in federal court is governed by *Townsend v. Sain*, 372 U.S. 293 (1963),

and works in conjunction with former § 2254(d). Townsend sets forth the circumstances under which a federal habeas court is required to hold an evidentiary hearing. Under *Townsend*, a petitioner is entitled to a hearing if he alleged facts which, if proven, would entitle him to habeas relief under § 2254, and if he "did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." 372 U.S. at 312. In the *Townsend* court's language, "a federal court *must* grant an evidentiary hearing to a habeas applicant under the following circumstances: If

(1) the merits of the factual dispute were not resolved in the state hearing;

(2) the state factual determination is not fairly supported by the record as a whole;

(3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequately developed at the state-court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

Id. at 313 (*emphasis added*). As a result, a federal habeas court is *required* to hold an evidentiary hearing if any of the above circumstances were satisfied. *Townsend* makes clear, however, that the habeas court retained the power, vested in the exercise of its sound discretion, to conduct a hearing even if none of these circumstances exist. *See id.* at 312 ("[T]he power of inquiry on federal habeas corpus is plenary.")

3. The fifth circumstance listed in *Townsend* warrants additional comment. Townsend held that if the material facts

were not "adequately developed in the state-court hearing," the federal habeas court was required to conduct an evidentiary hearing only if the failure to "adequately develop" the "material facts" was not due to the petitioner's "inexcusable neglect" *Id.* at *317, citing Fay v. Noia*, 372 U.S. 391, 438 (1963). The federal court is prohibited from conducting an evidentiary hearing only if the petitioner has "deliberately bypassed" the state fact-finding procedures. This "deliberate bypass" standard, originally drawn from *Fay v. Noia*, 372 U.S. 391 (1963), was abandoned in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Under *Tamayo-Reyes*, a habeas petitioner who fails to "adequately develop" the "material facts" in the state courts must show both "cause" and "prejudice" in order to satisfy the fifth circumstance of *Townsend and* compel the federal court to hold an evidentiary hearing. *See id.* at 8.[1]

4. Former §2254(d) was enacted after *Townsend* and works in tandem with *Townsend's* standards. Like *Townsend*, former §2254(d) sets forth certain circumstances in which state factfinding process is not entitled to a presumption of correctness.[2] While the circumstances listed in former

[1] A petitioner was entitled also to an evidentiary hearing if he could establish that a "fundamental miscarriage of justice" would arise if a hearing was not held. *See Tamayo-Reyes*, 504 U.S. at 12.

[2] Former § 2254(d) provides that a state-court "determination after a hearing on the merits of a factual issue . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

§ 2254(d) closely track those outlined in *Townsend*, they do not, as do the *Townsend* circumstances, serve to indicate when a federal hearing was required. Instead, they specify the circumstances under which a federal habeas court is no longer obliged to defer to state court findings of fact. In other words, the statute sets forth the circumstances under which state court findings of fact are no longer entitled to a presumption of correctness. While the two sets of circumstances are "obviously intertwined," *Tamayo-Reyes*, 504 U.S. at 21 (O'Connor, J., dissenting), because the former § 2254(d) presumption of correctness was usually defeated by the same showing required to mandate a hearing, they nonetheless served distinct roles. *See id.*

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record."

Unless he established one of the above factors, a petitioner could defeat the presumption of correctness only "by convincing evidence that the factual determination by the State court is erroneous." former 28 U.S.C. § 2254(d).

a. The process by which the state court "determined" the facts in Mr. Banks' case is inadequate and thus, the state court findings of fact are not entitled to former § 2254(d)'s presumption of correctness.

Ineffective Assistance of Counsel

5. Mr. Banks has pleaded, *inter alia*, a comprehensive claim of ineffective assistance of counsel. *See* Petition, paragraphs 97 through 122. This claim was timely presented in the state habeas court. The state court factual findings are not entitled to a presumption of correctness under former § 2254(d) because the process by which the state court "determined" the facts was inadequate to provide a full, fair and adequate hearing.

6. Mr. Banks requests an evidentiary hearing regarding trial counsel's ineffectiveness concerning the following areas:

(A) Whether trial counsel was ineffective in failing to conduct a constitutionally adequate investigation both into the state's case against Mr. Banks and possible defenses.

(B) Whether trial counsel was ineffective in failing to follow up on his pretrial motions, uncover facts essential to the successful prosecution of those motions, and question prospective jurors about their exposure pretrial publicity.

(C) Whether trial counsel was ineffective in failing to insure that members of the African-American community were represented on the jury.

(D) Whether trial counsel was ineffective in failing to acquaint himself with the facts the State would attempt to prove at the guilt phase and in failing to highlight the many inconsistencies and gaps in the State's case through reasonably adequate cross-examination.

(E) Whether trial counsel was ineffective with respect to the penalty phase in failing to make any meaningful investigation of the state's evidence of future dangerousness.

(F) Whether trial counsel was ineffective with respect to the penalty phase in failing to present all the mitigating witnesses who were prepared to testify on Mr. Banks' behalf and in failing to prepare the handful of witness he actually placed on the stand.

(G) Whether trial counsel was ineffective with respect to the penalty phase in failing to have Mr. Banks evaluated by any mental health professional and for failing to seek expert assistance in understanding or describing Mr. Banks' mental limitations to the jury.

(H) Whether trial counsel was ineffective with respect to the penalty phase in failing to take a social history from Mr. Banks or from his family and for failing to conduct a search for mitigating witnesses.

7. During state habeas proceedings, Mr. Banks requested a plenary evidentiary hearing on his ineffective assistance of counsel claim. *See Ex parte Banks*, Application No. 80-F102-C, Vol. I at 51 and 76. The state habeas court failed to hold a hearing and summarily denied relief, presumably based upon affidavits submitted by both parties. The court's one conclusory finding states only that "counsel for Applicant at trial did give Applicant effective assistance of counsel throughout all stages of the trial proceedings, including voir dire and pre-trial." Findings of Fact and Conclusions of Law, dated February 22, 1992.

8. Findings such as these, and based solely on a paper record, are not entitled to a presumption of correctness. *Salazar v. Johnson*, 96 F.3d 769 (5th Cir. 1996); *see Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996); *Amos v. Scott*, 61 F.3d 333 (5th Cir. 1995). While each case must be individually screened to determine whether "a paper hearing is appropriate to the resolution of the factual dispute underlying the petitioner's claim," *id.* at 792, *citing May v. Collins*, 955

F.2d 299, 312 (5th Cir.1992); *see Amos*, *supra*, at 347 (same); *Perillo v. Johnson*, *supra*, at 446 (5th Cir. 1996) (same), in the instant case, a paper hearing was inadequate to resolve Banks' ineffective assistance of counsel claim.

9. Mr. Banks submitted numerous affidavits during the post-conviction proceeding in support of this claim. These materials presented a broad array of evidence that trial counsel inexplicably failed to utilize during the guilt phase of Mr. Banks' trial. Instead, the defense rested at the first stage of the trial without producing any evidence at all. There was much that could have been offered.

10. For example, Demetra Jefferson could have testified that the reason Mr. Banks went to Dallas was to locate a home for she and their children to live. He and Ms. Jefferson were living together at the time with their four children. She also knew that Robert Farr illegally obtained prescription drugs and served as a snitch for law enforcement agencies. *See Ex parte Banks*, Application No, 80-F-86-102-C, Vol. II at 134 and 141 (affidavit of Rob Owen re Demetra Jefferson[3], and affidavit of Lynn Lamberty). Demetra Jefferson's information would have provided an alternative explanation for Mr. Banks' trip to Dallas on April 12 or 13. It also could have provided cross-examination material with which to challenge the credibility of Robert Farr.

11. The same inexplicable failure of defense counsel to present evidence extends to the punishment phase of trial as well. An alleged fight between Mr. Banks and Vetrano Jefferson proved central to the state's contention that Mr. Banks should receive the death penalty. The jury never knew, however, that Mr. Banks struck Mr. Jefferson only to protect

[3] Demetra Jefferson was unable to sign this affidavit as she was recovering from giving birth to her baby. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. II, at 134 and 141 (affidavit of Rob Owen re Demetra Jefferson and affidavit of Lynn Lamberty).

Demetra Jefferson, who was then pregnant. *Id.* Additionally, Mr. Banks submitted additional evidence which proved that both trial counsel, Lynn Cooksey, and trial counsel's investigator, Dennis Waters, failed to interview important mitigation witnesses, *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. V at 42 (affidavit of Curtis Dismuke, Exhibit R.III-B); an affidavit evidencing Waters' cursory interview of potential mitigating witnesses, *id.*, Vol. V at 42 (affidavit of Rev. G.W. McGraw, Sr., Exhibit R.III-A); *id.*, Vol. II at 134 and 141 (affidavit of Rob Owen re Demetra Jefferson, and affidavit of Lynn Lamberty); affidavits evidencing Mr. Banks' brain damage, deficiencies in long and short term memory, and diffuse neurological damage, *id.*, Vol. II at 120 (Affidavit of Gregoria Pina); and affidavits detailing trial counsel's failure to familiarize himself with the testimony of the witnesses he called for his client at the punishment phase of trial, *id.*, Vol. II at 4 and 13 (affidavits of Mr. and Mrs. Banks). Moreover, the trial record itself demonstrates trial counsel's failure to familiarize himself with the testimony of the witnesses he called for his client at the punishment phase of trial. 8 R 2358-2359.

12. Affidavits submitted by Cooksey and his investigator, Dennis Waters, fail to adequately resolve the questions of why this evidence was not used during the trial and why an adequate investigation was not conducted. The state, after at least four requests for additional time, filed its Answer to petitioner's state habeas application in early October 1992, and therein quoted and cited from an "affidavit" it had prepared for Lynn Cooksey. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. IV, at 9. Based upon this document, which was never produced, the state asserted that Cooksey began preparation of the punishment phase well in advance of the actual sentencing date and that he and Waters investigated the case for mitigation fully cognizant of all applicable rules.

Because this affidavit was never produced or filed, the state habeas judge could not have relied on it to conclude that counsel was effective.

13. On February 5, 1993, Mr. Cooksey sent a copy of an affidavit *different* from the one quoted by the State in its Answer, to Mr. Banks' state habeas counsel. *See* copy of letter from Mr. Cooksey to state habeas counsel attached hereto. This affidavit was eventually filed with the state habeas court. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. V, at 137. Unlike the non-existent affidavit quoted and cited by the State, the signed affidavit did not state that Cooksey began preparation for the punishment phase well in advance, or that he investigated the case for mitigation. Instead, it states that "I believe the record would reflect I consulted with my client on these matters." *Id.* As discussed above, this assertion is flatly refuted by the record. In fact, this affidavit supports Mr. Banks' claim that Cooksey did not meet, consult, or prepare witnesses to testify on Mr. Banks' behalf during the penalty phase. Cooksey only affirmed that he consulted with "my client" and no one else. Furthermore, his wholly conclusory statement that "My presentation of Delma Banks' defense was based on the trial strategy I chose to put forward on his behalf" fails to resolve the issue of his effectiveness. Without specific information detailing what his trial strategy was based upon, the state habeas judge had no opportunity to determine whether counsel was ineffective for failing to use the available evidence contained in the above-mentioned affidavits submitted by Mr. Banks. In other words, the paper hearing did not yield information regarding what factors informed that trial strategy. *See Wilson v. Butler*, 813 F.2d 664, 672 (5th Cir. 1987) (Counsel may make a strategic decision against pursuing a particular line of defense after less than complete investigation only to the extent that reasonable professional

judgment supports the limitations on investigation. Therefore, evidentiary hearing granted on issue of whether counsel was ineffective for failing to investigate mitigating witnesses).

14. The affidavit of Dennis Waters also failed to resolve the factual dispute. It stated, *inter alia*, that Mr. Waters interviewed witnesses who could testify on behalf of Mr. Banks' character. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. V, at 136. However, Waters' affidavit fails to identify the witnesses he interviewed or how much time he spent with them. In fact, this account of having talked with mitigation witnesses is flatly refuted. *Id.*, Vol. V at 42 (affidavit of Curtis Dismuke, Exhibit R.III-B). Moreover, another potential mitigating witness attests that Mr. Waters spent only five minutes questioning him. *Id.* (affidavit of Rev. G.W. McGraw, Sr., Exhibit R. III-A). Additionally, Mr. Cooksey could not have made any strategic decisions based upon any information Waters may have learned from these witnesses because Cooksey already admitted at trial that he did not know what the mitigation witnesses were going to testify about during the penalty phase. 9 R 2358-59.

15. Not only did the hearing fail to resolve the ineffective assistance of counsel claim since numerous factual questions remain unresolved, but also the state habeas court did not make any findings of fact which are entitled to a presumption of correctness. The only finding made by the state habeas court on this issue is its conclusory statement that "[t]he Court finds counsel for Applicant at trial did give the Applicant effective assistance of counsel throughout all stages of the trial proceedings, including voir dire and pre-trial." Findings of Fact and Conclusions of Law, dated February 22, 1992. The court made no background factual findings in support of this conclusion, including whether counsel's failure to present the full range of mitigating evidence available in Mr. Banks' case was a strategic decision, and never stated that he found Cooksey's and Waters'

affidavits credible. As the Fifth Circuit has stated, "Of course, if the state habeas court did not make factfindings on an issue, the federal habeas court is free to examine the issue unconstrained." *Perillo*, 79 F.3d at 446; *See Armstead v. Scott*, 37 F.3d 202, 209 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1709 (1995).

16. Evidentiary hearings are mandated when the evidence raises a genuine issue of fact and where the state court fails to make findings on all unresolved issues, *Perillo, supra; Salazar, supra*, at 792 (evidentiary hearing required because district court's reliance on state court's "implicit" finding regarding ineffective assistance of counsel was unsupported by the record) and when the court fails to make factfindings on an issue. *See Perillo, supra*, at 446.

17. A hearing is warranted here because the evidence presented by petitioner Banks to the state habeas court shows that counsel's failure to investigate was unreasonable and prejudiced him at each phase of trial. The state court's wholly conclusory finding of fact failed to resolve this issue; indeed, there are no factual findings entitled to a presumption of correctness. The factual disputes raised by the proffered affidavits as to counsel's ineffectiveness raise a genuine issue of fact that can only be resolved through an evidentiary hearing in this Court.

Prosecutorial Misconduct

18. Mr. Banks has pleaded, *inter alia*, a straightforward claim of prosecutorial misconduct. *See* Petition, paragraphs 147 through 156. First, Mr. Banks pleaded that the state failed to reveal a secret agreement it had with Mr. Cook, the state's star witness. The prosecutors' concealment of information critical to the jury's assessment of Cook's credibility denied Mr. Banks his rights under the Sixth and Fourteenth Amendments. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*,

360 U.S. 264 (1959). Second, Mr. Banks pleaded a claim that the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 363 U.S. 83 (1963). This evidence included information that would have revealed Robert Farr as a police informant and Mr. Banks' arrest in Dallas as a "set-up." This evidence was material to guilt and its disclosure to the jury could well have resulted in Mr. Banks' acquittal; the prosecution's determined concealment of the evidence deprived Mr. Banks of due process of law and a fundamentally fair trial.

19. This claim was presented previously in the state habeas court. However, factual development of these claims was impeded by that court's rejection of Mr. Banks' requests for discovery, investigative funds, and an evidentiary hearing. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. I, at 76 (Petitioner's application for writ of habeas corpus); Vol. I at 51 (motion for stay and evidentiary hearing); Vol. IV, at 1 (motion for investigative and court analyst funds); Vol. V, at 45 (motion for hearing on motion for discovery and compliance with texas open records act). Thus, Mr. Banks was deprived a full and fair hearing on the issue of prosecutorial misconduct.

20. In support of his application for a writ of habeas corpus, for discovery and for an evidentiary hearing during state habeas proceedings, Mr. Banks proffered the affidavit of Pat DeLaune, an investigator with the Texas Resource Center. *Ex parte Banks*, Application No. 80-F-86-102-C, Vol. II, at 18. Mr. DeLaune interviewed Cook on January 10, 1992, in Dallas, Texas. During that interview, Cook revealed that state officials told him that Mr. Banks was accusing him of involvement in Richard Whitehead's murder. He later learned that the state's representations were untrue. Cook also revealed that Texarkana authorities threatened to charge him as an accessory to capital murder and threatened to prosecute him under the habitual offender law for his pending arson

charges if he did not testify for the prosecution at Mr. Banks' trial.

21. During Mr. Banks' trial, on cross-examination, Mr. Cooksey attempted to establish Cook's bias by questioning him about the pending arson charges:

Cooksey:	Have you been indicted for arson?
Cook:	Yes, sir.
Cooksey:	Did they put the habitual criminal act on you?
Cook:	Yes, sir.
Cooksey:	And they got you where you've got to testify, haven't they, Mr. Cook?
Cook:	No, sir.

9 R 2154.

22. Mr. Banks also proffered Cook's criminal records during state habeas proceedings. This history demonstrates that at the time of his testimony for the State at Mr. Banks' trial, Cook faced a long prison term on pending arson charges for setting fire to his sister's house. The records show that Cook was indicted on May 28, 1980, for the offense of arson. Cook was reindicted under Texas' habitual offender statute in August 13, 1980, for the same offense, despite the fact that his sister had signed an affidavit of non-prosecution prior to the reindictment. On October 2, 1980, two days after his testimony at Mr. Banks' trial, the State of Texas dismissed the charges against Cook.

23. On July 7, 1981, after Banks' trial, Cook pled guilty to the offense of passing a forged instrument. In his letter to the judge asking for a favorable recommendation to commute his six year sentence for this forgery offense, Cook characterized his testimony in Mr. Banks' trial as follows:

> I Charles Edward Cook testerfive [sic] for the State in a capital murder trail [sic] in Bowie County in 1980. I was taken to Texakana, Texas [sic] from the Dallas

> county jail by Sheriff Willie Huff. I did a very good job for the State, me and my wife. The suspect (Delma Banks Jr) recive [sic] the death penalty.

Ex parte Banks, Application No. 80-F-86-102-C, Vol. II, at 21.

24. The State responded to the allegations of misconduct by proffering affidavits of Willie Huff and James Elliott which stated summarily that there was no secret agreement with Cook in exchange for his testimony, *Id.*, Vol. V, at 116 and 117, and an affidavit of Kevin Byrne, an assistant district attorney in Dallas County; which stated only that he had no recollection of any deal with Cook. *Id.*, Vol. V, at 118.

25. The state habeas court's resolution of this issue through a paper hearing failed to provide a full and fair adjudication because it leaves the merits of the factual dispute unresolved.

26. First, the state offers no credible evidence to explain why felony charges on arson (cause No. F80-06324-LM and cause No. F80-9117-habitual) pending against Cook in Dallas County, were dropped so suddenly and so shortly after his testimony at Mr. Banks' trial. The state's two proffered affidavits from persons involved in law enforcement in Bowie County, *not* Dallas County, and an affidavit from a Dallas prosecutor in a case that Cook was charged with *after* his testimony against Mr. Banks [4] do not explain why the *arson* charges pending against Cook during the pendency of Mr. Banks' trial were mysteriously dropped. This indisputable

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[4] Respondent Johnson is mistaken in his assertion that the State submitted an affidavit of the Dallas prosecutor who handled the arson case against Charles Cook. Answer at 111. The State proffered the affidavit of Kevin Byrne, the assistant district attorney who prosecuted Cook's forgery conviction, cause No. F81-2140-P, a charge that Cook received *after* Delma's trial. Mr. Byrne was not the district attorney who prosecuted Cook's arson charges. Thus, this affidavit is irrelevant to the issue of whether the state dropped Cook's pending arson charges in return for his testimony in Mr. Banks' trial.

fact, coupled with Cook's own admissions, *id.*, Vol. II, at 18, clearly establish. that. the question of whether there was a secret deal cannot be resolved fully, fairly and adequately without an evidentiary hearing.

27. With respect to Mr. Banks' claim that the state failed to reveal that Robert Farr was a police informant and that Mr. Banks' arrest in Dallas was a result of a "set-up," the state habeas court made no findings of fact. Thus, there are no factual findings entitled to a presumption of correctness.

28. When claims of prosecutorial misconduct are alleged, the claim must be resolved before the ultimate punishment constitutionally may be imposed:

> While we are cognizant of the toll habeas wreaks on finality, we are also concerned that both fairness and the appearance of fairness be preserved, especially in light of the punishment assessed. In our criminal justice system the prosecutor has at his disposal the substantial resources of the government as well as considerable other advantages. In exchange, that system reposes great trust in the prosecutor to place the ends of justice above the goal of merely obtaining a conviction."

Kirkpatrick v. Whitley, 992 F.2d 491, 496, (5th Cir. 1993). In *Kirkpatrick*, the Fifth Circuit remanded the case for an evidentiary hearing on prosecutorial misconduct because the allegations were supported by evidence and because the court could not make a determination concerning the claim of prosecutorial misconduct due to the inadequate factual record. *Id.*, at 497-98. Similarly, in the instant case, numerous questions regarding prosecutorial misconduct remain unresolved. Thus, Mr. Banks requests an evidentiary hearing regarding prosecutorial misconduct in the following areas:

(A) Whether the prosecution failed to turn over exculpatory evidence, including information that Robert Farr was a police informant and that Mr. Banks' arrest in Dallas was a "set-up."

(B) Whether the prosecution used perjured testimony in allowing Robert Farr to testify that he was not a police informant, and that he did not "set-up" Mr. Banks' arrest in-Dallas.

(C) Whether the prosecution failed to disclose that its star witness, "Two-Two" Cook, was testifying in return for leniency in a pending case.

(D) Whether the prosecution failed to disclose that its star witness, "Two-Two" Cook, was suffering from a mental illness at the time of his testimony at Mr. Banks' trial.

29. Mr. Banks is entitled to an evidentiary hearing on his claims of ineffective assistance of counsel and prosecutorial misconduct because the material facts were not adequately developed in the state habeas court. Material facts are "those facts crucial to a fair, rounded consideration of a petitioner's claim." *Streetman v. Lynaugh*, 812 F.2d 950, 953 (5th Cir. 1987)(citation omitted). "Material facts have not been adequately developed where the petitioner alleges undeveloped evidence sufficient to call into question the reliability of the state court's determination of petitioner's federal claim." *Id.* at 958. The factual disputes raised by the proffered affidavits raise genuine issues of fact that can only be resolved through an evidentiary hearing in this Court.

Systematic Exclusion of Minority Jurors Claim

30. Mr. Banks has also pleaded a claim based upon *Swain v. Alabama*, 380 U.S. 202 (1965). See *Petition* at paragraphs 75 through 90 and 133 through 136. While the state court held a hearing on this claim, the state's refusal to provide access to records in its possession relevant to this claim, the state court's unwillingness to order the state to provide this information, and its refusal to grant Mr. Banks investigative funds, prevented Mr. Banks from actually confirming the race of certain jurors who were peremptorily struck by the state during the relevant years. The state court

thereafter faulted Mr. Banks' statistical study because of this "missing" data.

31. Mr. Banks is now prepared to supplement the record with this missing data pursuant to Rule 7 of the Rules Governing § 2254 Proceedings.

Evidence Relevant to State's Procedural Default Arguments

32. Mr. Banks also reserves the right to seek a hearing, if necessary, to show that sufficient reasons exist to excuse any default made on any claim in state court. Respondent claims that four of the claims presented in the petition are default; while Mr. Banks sharply disputes this claim, a hearing might be necessary to resolve these issues.

b. Petitioner Banks did not fail to develop facts in state court and therefore should be entitled to a hearing in federal court so long as the standards set forth in *Townsend* are satisfied.

33. Mr. Banks did not fail to develop facts in state court in support of his claims of ineffective assistance of trial counsel, prosecutorial misconduct, and purposeful exclusion of African-American citizens from trial jury service.

34. Evidentiary hearings are required where the causes of the inadequate record and unreliable state proceedings are factors "external to the defense", such as a showing that the factual or legal basis of the defense was not reasonably available to counsel or that some interference by officials made compliance impossible. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Reed v. Ross*, 468 U.S. 1, 16 (1984); *Brown v. Allen*, 344 U.S. 443, 486 (1953). Also, the federal courts have extended no deference or weight to state court habeas determinations where state courts or state law have restricted the petitioner's ability to gather evidence needed to present their claims to the state court. *See Moore v. Kemp*,

809 F.2d 702, 730 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987); *Marble v. Edwards*, 457 F.2d 759 (5th Cir. 1972). In this case, the incompleteness of the State court record was the result of external factors, including the State habeas court's refusal to grant petitioner's motions for funds for expert assistance and its refusal to hold an evidentiary hearing. Furthermore, it is the result of the fear of witnesses, including Robert Farr, to provide information at the time of state habeas proceedings, and the state's failure to reveal exculpatory evidence. Thus, Mr. Banks did not fail to develop facts in state court in support of his claims for relief.

35. As detailed in the previous section, petitioner Banks proffered affidavits in support of his claims. Additionally, he requested discovery and an evidentiary hearing in state court in order to develop facts in support of his claims for relief. However, despite Mr. Banks' requests for discovery and a hearing, his requests were summarily denied by the state habeas court. Thus, Mr. Banks did not fail to develop facts in state court and is entitled to an evidentiary hearing in federal court pursuant to the standards set forth in *Townsend*.

CONCLUSION

On this day, Mr. Banks has filed a motion for leave to conduct discovery. Mr. Banks respectfully suggests that the most expeditious way to proceed is for the Court to act upon and grant Mr. Banks' discovery motion. Moreover, the Court should also grant Mr. Banks' requests for an evidentiary hearing regard-ing trial counsel's ineffectiveness and prosecutorial mis-conduct concerning the areas detailed above. Moreover, Mr. Banks reserves his right to amend this motion.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DELMA BANKS, JR §

V.S. § CIVIL ACTION NO. 5:96cv353
JUDGE DAVID FOLSOM

GARY JOHNSON, Director
Texas Department of Criminal Justice
Institutional Division

ORDER

Comes on to be considered the Motion for Leave to Conduct Discovery, filed herein by DELMA BANKS, JR. The court having considered same along with the Opposition to Petitioner's Motion for Leave to conduct discovery, finds that same should be granted in part and denied in part.

Background

On March 7, 1996, Petitioner filed his federal habeas petition in this Court. The petition alleged fourteen grounds for relief from Petitioner's conviction and sentence of death.[1] Respondent filed his Answer and Motion for Summary Judgment on September 23, 1996. The parties initially disagreed over whether the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 [2] ("AEDPA"), were to be applied retroactively to pending federal habeas

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[1] Petitioner was convicted and sentenced to death by the 102nd District Court of Bowie County Texas, on October 1, 1980. This judgment and sentence was affirmed by the Texas Court of Criminal Appeals. *Banks v. Texas*, 643 S.W.2d 129 (Tex. Crim. App. 1982). Petitioner subsequently filed three separate state habeas petitions all of which were ultimately denied by the Texas Court of Criminal Appeals. The Respondent in this federal habeas action concedes that Petitioner has exhausted all state remedies.

[2] The effective date of the AEDPA was April 24, 1996.

proceedings. On September 17, 1997, the Court denied all pending motions, without prejudice to refiling same, as a result of *Lindh v. Murphy*, 527 U.S. 320 (1997), which held that the AEDPA was not retroactive to pending cases. On June 15, 1998, Petitioner filed his Motion for Leave to Conduct Discovery and Motion for Evidentiary Hearing. Respondent filed his Opposition to these Motions on July 7, 1998.

Motion for Leave to Conduct Discovery

Petitioner requests discovery limited to two areas of claimed ineffective assistance of counsel and three areas of claimed prosecutorial misconduct. Petitioner seeks discovery in relation to two claims of ineffective assistance of counsel: (1) counsel was ineffective in challenging the credibility of the State's primary witness, Charles "Two Two" Cook, regarding guilt or innocence; and (2) counsel was ineffective in challenging the credibility of, Willie Huff, the primary law enforcement officer who investigated the case. Petitioner also seeks discovery regarding alleged prosecutorial misconduct regarding: (1) failure to disclose a secret agreement with Charles Cook regarding favorable treatment in exchange for his testimony;[3] (2) failure to reveal that a second state witness Robert Farr, was a police informant; and (3) failure to reveal that Petitioner's initial arrest was the result of some "set up" arranged by law enforcement, Charles Cook and Robert Farr.

[3] The Court notes that although Petitioner indicates that he seeks to have discovery regarding the State's failure to disclose evidence of the "secret deal" it had with Charles Cook, he makes no specific request for discovery in that regard. Habeas Corpus Rule 6(b) requires that any request for discovery "be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced."

Applicable Law

Rule 6 of the Rules governing Section 2254 cases provides in part:

> A party shall be able to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so.

However, before addressing whether a petitioner is entitled to Rule 6 discovery, the Court must first identify the "essential elements" of the claim for which he is seeking discovery. *Bracy v. Gramely*, 520 U.S. 899, 117 S.Ct. 1973, 1979 (1997). Further, federal court is not a "forum in which to relitigate [a] state trial." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Where a Petitioner's allegations merely suggest that discovery might uncover evidence of a *prima facie* claim, such allegations are conclusory and insufficient to warrant Rule 6 discovery. *East v. Scott*, 55 F.3d 996, 1005 (5th Cir. 1995). In this case the Petitioner seeks discovery directed at his claim of ineffective assistance of counsel for failure to effectively cross examine the primary witness against him. If Petitioner's allegations are true and there was a "secret deal" between the state and the witness, then same should have been brought out on cross examination. Despite the Respondent's assertion to the contrary, Petitioner has set out in his Petition, specific, factual allegations which would entitle him to relief if same were proven true.

The United States Supreme Court in *Harris v. Nelson*, 394 U.S. 286 (1969), established the standard for the court to use in exercising its discretion with respect to discovery requests in habeas proceedings. The Court stated:

> We do not assume that the courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. . . . But where *specific allegations before the court show reason to believe that*

> *the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally*, and is therefore entitled to relief, it is the *duty* of the court to provide the necessary facilities and procedures for an adequate inquiry.

Id. at 299. Habeas Corpus Rule 6 is meant to be consistent with *Harris*. See, Advisory Committee's Note on Habeas Corpus Rule 6. Petitioner has shown good cause for allowing certain limited discovery in this matter.

Petitioner also seeks discovery regarding Willie Huff, the primary investigating officer in the case. Petitioner has made no claim that his trial counsel was ineffective for failing to effectively cross examine Officer Huff. Petitioner has alleged no facts which would support a claim of official misconduct by Officer Huff. Petitioner has made no showing of a *prima facie* case of entitlement to the discovery requested regarding Willie Huff and such request is denied. Similarly, Petitioner has failed to make specific factual allegations which would entitle him to relief regarding alleged police informant Robert Farr or an alleged "set up" of the arrest of petitioner. The request for discovery regarding those issues is therefore denied.

IT IS THEREFORE ORDERED that Petitioner be allowed the following limited discovery, to be conducted in accord with the Federal Rules of Civil Procedure:

1. Production of documents from the Bowie County Jail, the Dallas County Jail, the Bi-State Correctional Facility and the Texas Department of Criminal Justice, identifying the prison personnel on duty during Charles Cook's incarceration from May 14, 1980 through October 2, 1980.

2. Production of documents from the Bowie County Jail, the Dallas County Jail, the Bi-State Correctional Facility and the Texas Department of Criminal Justice, relating to the

behavior of Charles Cook during his incarceration from May 14, 1980 through October 2, 1980.

IT IS FURTHER ORDERED, that all discovery be completed within sixty days of Petitioner's receipt of this Order, that Petitioner supplement the record in this case with any relevant materials obtained during discovery within ten days of his receipt of same and that no oral depositions are authorized.

The Court reserves its decision on Petitioner's Motion for Evidentiary Hearing until completion of the discovery authorized by this Order.

SIGNED this 28th day of October 1998.

/s/ Caroline Malone
CAROLINE MALONE
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

v.

GARY JOHNSON, Director,
Texas Department of Criminal
Justice, Institutional Division,
Respondent.

RESPONDENT JOHNSON'S RESPONSE TO COURT'S ORDER DESIGNATING ISSUES FOR EVIDENTIARY HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Respondent Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division, (hereinafter the "Director"), by and through his attorney, the Attorney General of Texas, and files this his **Response to Court's Order Designating Issues For Evidentiary Hearing**. The Director would show the Court the following:

I.

On March 7, 1996, Banks filed his federal habeas petition in this Court, alleging fourteen grounds for relief, and on September 23, 1996, the Director filed an Answer and Motion for Summary Judgment, detailing the reasons why Banks

petition must be dismissed as a matter of law. On July 7, 1998, the Director filed his oppositions to Banks' motions for discovery and evidentiary hearing, filed June 15, 1998.

On January 25, 1999, this court scheduled an evidentiary hearing for June 7-8, 1999, and ordered the parties to identify those issues "which would entitle Petitioner to relief if proven, and for which Petitioner did not receive a full and fair hearing in state court." As the Director has set forth in his Answer and Motion for Summary Judgment and his Opposition to Evidentiary Hearing, Banks has presented no issues that meet these requirements.

First, Banks is barred from pursuing further factual development of his claims in federal court. *See Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1721 (1992). Banks received three state habeas evidentiary hearings over a 13 year period in which he had the opportunity to factually develop his claims. The first state habeas court conducted an evidentiary hearing on January 2, 1984. *Ex parte Banks*, Application No. 13,569. The second state habeas court conducted an evidentiary hearing on May 15, 1984. *Ex parte Banks*, 769 S.W.2d 539 (Tex Crim. App. 1989). The third state habeas court conducted an evidentiary hearing from March 29-April 1, 1993, and on July 22, 1993. *Ex parte Banks*, Application No. 13,568-03. Under *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1721 (1992), a petitioner who has failed to develop the factual basis of his claims in state court is entitled to further factual development of a claim on federal habeas review only (1) upon a demonstration of cause for the failure to develop the facts and actual prejudice resulting from that failure; or (2) if the failure to hold an evidentiary hearing would result in a fundamental miscarriage of justice. *Keeney* makes clear that the "cause and prejudice" and "fundamental miscarriage" exceptions applicable here are the same as those applicable to abusive or successive petitions or to procedurally barred claims. 112 S. Ct. at 1719-20. The cause standard requires the

petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S. Ct. 1454, 1470, (1991). Banks has not demonstrated how he was prevented from pursuing factual development of his claims in the three proceedings he was afforded in state court.

Furthermore, Banks' claims do not implicate the narrow exception to the cause and prejudice requirement that exists when the failure to hold a federal hearing will result in a fundamental miscarriage of justice. *Keeney v. Tamayo-Reyes*, 112 S. Ct. at 1721. A "'fundamental miscarriage' implies that the 'constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Sawyer v. Whitley*, 945 F.2d 812, 816 (5th Cir. 1991). Banks cannot prove, nor does he allege, that any further factual development would create a reasonable doubt as to his guilt. Because Banks cannot establish cause and prejudice, or that he is actually innocent, *Keeney* bars the further factual development of his claims, in this Court.

As the Director argued in his Opposition to Evidentiary Hearing, and as set forth in his Answer and Motion for Summary Judgment, one or more of the following apply to each of Banks' claims: (1) Banks has failed to allege facts entitling him to relief; (2) his allegations are conclusory and unsupported; (3) Banks' claims may easily be resolved on the basis of the state court record; (4) the state court's fact findings must be presumed correct. 28 U.S.C. § 2254(d) (pre-AEDPA). Answer at 37-60 (ineffective assistance claims); 108-12 (suppression of evidence claims). Accordingly, Banks has failed to demonstrate his entitlement to an evidentiary hearing with regard to any of his claims.

Moreover, although Banks received several evidentiary hearings in state court, he made no request to present evidence of any of the claims for which he now seeks a hearing. Nor has Banks pointed to anything in the record

indicating that the trial court prohibited him from exploring additional areas at the evidentiary hearings. Banks has thus not shown that the State prevented him from developing his claims in state court, nor has he met cause and prejudice or actual innocence exceptions of *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1721 (1992). Thus, the Director identifies no issues that meet the requirements for receiving a federal evidentiary hearing.

Respectfully submitted,

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[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DELMA BANKS, JR.
Petitioner,

vs. Civil Action No. 5:96-CV-353

GARY JOHNSON, Director,
Texas Department of Criminal Justice
Institutional Division,
Respondent.

REPLY TO COURT'S ORDER OF JANUARY 21, 1999

On January 21, 1999, the Court directed the parties to identify "issues for which the party believes additional evidence should be taken." In this pleading, Mr. Banks submits the following to comply with said order.

1. In previous filings, Mr. Banks has demonstrated his entitlement to present evidence in this proceeding on three claims, each of which implicates the essence of the adversarial system's capacity to deliver a just result. They are: (1) his Fourteenth Amendment claim that the prosecution withheld crucial exculpatory and impeaching evidence concerning at least two important state witnesses—Charles Cook and Robert Farr (herein Cook/Farr claim); (2) his Sixth and Fourteenth Amendment claims that trial and direct appeal counsel failed to provide minimally effective assistance at trial and on direct appeal, and (3) his Fourteenth Amendment discrimination claim concerning the Bowie County district attorney's office longtime practice of peremptorily removing nearly all African-American jurors from felony cases.[1]

[1] *See* Motion for Evidentiary Hearing & Motion for Discovery filed in June, 1998.

2. Director Johnson has responded that as to each of the above claims Mr. Banks is not entitled to conduct discovery or present evidence before the Court.[2]

3. Mr. Banks takes this opportunity to explain why the Director is mistaken, and why he indeed is entitled to conduct discovery on the prosecution misconduct claim, and present evidence in support of each of these meritorious claims.

I. The Cook/Farr Claim

a. Relevant Procedural History

1. Trial Proceedings: Repeated Assurances of No Deals or Impeachment Material

4. As the prosecutors prepared their case for trial, it had to have struck them that they had serious problems at each phase of trial. They had no custodial confession to present, nor any eyewitness who would say that Mr. Banks fired the fatal shots that killed Richard Whitehead. Nor did they have a motive; indeed, their evidence would show that during the hours leading up to the shooting, Mr. Banks and Mr. Whitehead were behaving as teenagers and young adults typically do all over Texas and throughout the country on many nights of the year. They purchased some beer, and rode around their home town accompanied by Mr. Whitehead's date. By all accounts, there were no disputes; indeed everyone got along just fine.

5. Moreover, when Mr. Whitehead's body was found three days later in the park, the fact that his watch had not been removed and money remained in his pocket undercut the state's trial theory that he was killed during a robbery. Nor did the state possess nor could it account for the whereabouts of Mr. Whitehead's car, the only item it was prepared to ask the jury to find was stolen.

[2] *See* Respondent Johnson's Response, filed July 7, 1998.

6. With regard to its case for the death penalty, the prosecutors' evidence was equally wanting. Mr. Banks had no prior conviction for any crime. Nor did the state possess any psychiatric evidence that Mr. Banks was a sociopath or otherwise dangerous. It had but two recent incidents, one involving a brief fight between Mr. Banks and his common-law brother-in-law, Vetrano Jefferson, and more damaging evidence from another common-law brother-in-law, Robert Farr, concerning boasts about wanting to commit armed robberies. In short, the state was in no position to show that Mr. Banks was Ted Bundy, or that he posed a danger in the future or deserved execution.

7. Yet the prosecutors' most daunting challenge was to overcome serious credibility problems with its key witnesses. While they planned to call a dozen or so witnesses to the stand, most were bit players compared to Charles Cook and Robert Farr. Charles Cook's testimony—that he met Mr. Banks in Dallas on the morning after Mr. Whitehead was likely shot, that Mr. Banks was driving a car that resembled Mr. Whitehead's, and that over the course of the following three days, Mr. Banks told Cook that he killed Mr. Whitehead, and loaned Mr. Cook the alleged murder weapon and Mr. Whitehead's car—was the centerpiece of the state's case. As District Attorney Raffaelli would later repeatedly tell the jurors in his opening statement, "I think the testimony of Charles Cook is critical, . . ." 9 R 2129. Mr. Farr's testimony—that Mr. Banks initiated a subsequent trip to Dallas with Farr and another common-law brother-in-law, Marcus Jefferson, one week later so that Mr. Banks could retrieve his pistol from Mr. Cook so that he could commit armed robberies and, if necessary, kill during those crimes—was the linchpin of its case for the death penalty as, the state would argue, it demonstrated that Mr. Banks would likely grievously harm, or kill again.

8. The prosecutors had good reason to wonder whether jurors would believe Cook. He was a drug user and twice convicted felon who was facing still another felony prosecution in Dallas for arson. Moreover, habitual offender papers were filed in that case one month prior to Mr. Banks' trial which meant, upon conviction, that he faced a very long prison sentence. Surely some members of the jury might seriously wonder whether Cook was testifying honestly, or whether he was shading the truth to please Bowie County authorities in the hope that they would prevail upon the Dallas authorities to dismiss the arson charge.

9. Farr had similar credibility warts. He too had a drug habit. As with Cook, some jurors might wonder whether he was telling the truth or was falsely aiding the state to help himself.

10. Prior to trial, prosecutors took the initiative and informed Mr. Banks and counsel that the state would provide all discoverable material without requiring the defense to file motions. In a letter to counsel dated July 7, 1980, then assistant district attorney Charles Attaway advised counsel: "we will, without necessity of motions provide you with all discovery to which you are entitled." [3] Existing law required the prosecutors to reveal to the defense material exculpatory and impeaching evidence as to both guilt and penalty in prosecution and police investigative files. *See Brady v. Maryland*, 373 U.S. 83 (1963).

11. Prior to trial, with the exception of Mr. Cook's rap sheet, prosecutors turned over no information of an exculpatory nature on any state witness.

12. During trial, Mr. Banks sought to show jurors that Mr. Cook's and Mr. Farr's incriminating testimony was not truthful. He attempted to establish that Cook had made a deal

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[3] Trial counsel nevertheless filed a comprehensive motion for discovery on August 15, 1980. 1 R 24.

for his highly prejudicial and untruthful testimony to ensure that his arson charge and habitual offender papers would be dismissed shortly after trial. *See* 2145-2158. In his testimony, Mr. Cook denied speaking with the prosecutors prior to trial, and that he had made a deal with them for his testimony. *Id.* Both prosecutors' assured the court and jurors that Mr. Cook's testimony was truthful and was not influenced by any deal. Mr. Raffaelli stated "[j]ust for the record, Judge, there have been no deals." 9 R 2317. Shortly thereafter, Mr. Elliott confirmed with regard to Mr. Cook that "there is no deal." *Id.* at 2320.

13. When Mr. Farr returned to the witness stand during the penalty phase, he denied that he had acted as an informant for investigator Huff during Huffs pre-arrest surveillance of Mr. Banks. He also denied that authorities had conferred benefits upon him in exchange for his cooperation, even though he was not prosecuted for drug paraphernalia he possessed at the time of Mr. Banks' arrest. 10 R 2503-08. Moreover, he testified that he did not initiate the trip to Dallas that led to Mr. Banks' arrest. The prosecution acquiesced in this testimony and gave no indication to anyone that it was not truthful.

14. In closing arguments, the prosecutors repeatedly felt the need to assure jurors that witnesses Cook and Farr should be believed, and repeatedly—and improperly—vouched for their credibility. In his opening summation at the guilt phase, Mr. Elliott told the jury that no state witness had reason to falsely testify, 10 R 2448, and that "Charles Cook did not hide anything from you," "he didn't hide a thing from you," "Charles Cook brought you absolute truth" *Id,* at 2450. Acknowledging that jurors might conclude that Cook's nervous witness stand demeanor showed dishonesty, Mr. Elliott again assured the jury that "Charles Cook didn't budge from the truth, and that's ample evidence that Charles Cook is telling the truth." *Id,* at 2453. And once again, he exclaimed

that "Charles Cook did not hide anything from you," and more broadly declared "we didn't hide anything with regard to any of these witnesses." *Id.*

15. During penalty phase argument, the prosecutors returned to these themes. Mr. Raffaelli pointedly assured the jury that Robert Farr "has been open and honest with you in every way." *Id.*, at 2579.

16. On September 30, 1980, Mr. Banks was sentenced to death. Mr. Cook's arson charge was promptly and summarily dismissed by Dallas authorities on October 2, 1980.

17. Thus, it is difficult to overstate the importance to the state's case at each phase of trial that jurors perceive Charles Cook and Robert Farr as credible and that their testimony was the truth. Surely if the state withheld evidence that casts either witnesses' testimony in a different light, confidence in the jury's verdicts crumbles.

2. *State Post-Conviction Proceedings: Some Evidence of Withheld Exculpatory and Impeaching Material Appears But State Courts Summarily Reject Claim.*

18. During state habeas proceedings, Mr. Banks had no reason to doubt the prosecutor's trial assurances that neither Cook nor Farr testified falsely. But in January, 1992, he came upon evidence for the first time that suggested that his trial had been rendered fundamentally unfair by the state's suppression of exculpatory material. In an interview conducted by a volunteer investigator temporarily aiding Mr. Banks who was then facing a rapidly approaching execution date, Charles Cook stated that he indeed had testified against Mr. Banks pursuant to an agreement that if he did so, the pending arson charge and habitual offender papers would be dismissed. *See* Exhibit D to Petition for Writ of Habeas Corpus filed January 13, 1992 in the 102nd District Court of Bowie County, Texas. However, fearing reprisals, Mr. Cook refused to again meet

with or speak to Mr. Banks' representatives, and thus refused to sign any affidavit.

19. Mr. Banks affirmatively sought the aid of the court to enable him, *inter alia*, to fully develop the facts relating to Mr. Cook's January, 1992 declarations. In October, 1992, Mr. Banks, moved the court for funds so that he could, *inter alia*, retain the services of an investigator. He stated: "Mr. Banks needs the aid of an investigator in order to develop fully his allegation that the Bowie County District Attorney's office had not disclosed that a favorable deal had been arranged for Charles "Two-Two" Cook, the State's chief witness, in exchange for his testimony against Mr. Banks." *See* Motion for Investigative and Court Analyst Funds, filed October 1, 1992 pp. 1-2.

20. In its answer to this claim, the Director denied that the state had made any deal with Mr. Cook for its testimony. *See* Respondent's October 5, 1992 Original Answer at p. 5. The state supported this assertion with a bare two sentence declaration from investigator Willie Huff in which he stated: "Charles Cook was never a suspect in the murder of Richard Whitehead," and "[t]here was no deal, secret or otherwise, with Charles Cook." *See* Exhibit I-A to Respondent's Original Answer. Prosecutor Elliott provided a similarly laconic denial: "1. I am aware of all facts concerning the investigation and prosecution of Delma Banks. . . . 3. There was no secret agreement with Charles Cook in exchange for his testimony. 4. I am unaware Charles Cook was ever considered a suspect in the murder of Richard Whitehead." *See* Exhibit I-B to Respondent's Original Answer.

21. The court never acted upon Mr. Banks' funds request, and never provided any monies for an investigator so that he could pursue this claim or any other suggestion that exculpatory or impeaching evidence in the state's possession had in fact been suppressed.

22. Mr. Banks also charged in his petition that the state had withheld impeaching information concerning Mr. Cook and Mr. Farr, and regarding Mr. Farr, claimed the state failed to disclose that he was a police informant and had orchestrated the trip to Dallas that culminated in Mr. Banks arrest. The state never addressed these allegations in its responding papers. No evidentiary hearing was held on this claim.

23. In its February 22, 1993 Findings of Fact and Conclusions of Law, the habeas judge found, based upon the sparse record, that "there was no agreement between the State and the witness Charles Cook." It made no other findings relevant to these matters. Nor did the Texas Court of Criminal Appeals make additional findings.

b. Current Federal Habeas Proceedings

24. In his petition for writ of habeas corpus, Mr. Banks has alleged that Mr. Cook and Mr. Farr's testimony was not truthful in material respects, that Mr. Cook lied about not having a deal in his arson case, and that Mr. Farr lied in denying he was an informant in this case and that he did not set Mr. Banks up to go to Dallas, and that the prosecutors failed to correct these misrepresentations before the jury. Because the state court did not provide a hearing on these allegations, Mr. Banks has requested an evidentiary hearing and sought leave of court to conduct necessary discovery. The Director has responded that Mr. Banks is not entitled to either discovery or a hearing because the state court adequately resolved these issues, and because his claims are too speculative.

25. Mr. Banks does not understand the Director to oppose either discovery or an evidentiary hearing should he produce specific evidence that suggests this claim has merit. Mr. Banks now possesses such evidence. Indeed, the evidence Mr. Banks submits with this pleading in support of this claim

compels both an order granting leave to conduct discovery and an evidentiary hearing.

26. Attached to this pleading are the affidavits of five state witnesses: Charles Cook, Robert Farr, Carol Cook, Marcus Jefferson and Vetrano Jefferson. In considerable detail, and in sharp contrast to the summary and unadorned affidavits submitted by the Director in state court, each witness provides relevant and detailed evidence that leaves little doubt that state misconduct deprived the jury of critical material concerning Mr. Cook and Mr. Farr's credibility. The content of each is summarized briefly below:

a. Declaration of Charles Cook: Mr. Cook puts to rest the issue of whether he testified pursuant to an understanding that the pending arson charge and habitual offender papers would be dismissed upon him testifying against Mr. Banks in a manner satisfactory to Bowie County authorities. Such an agreement in fact existed. Moreover, he affirms that much of the most prejudicial testimony he offered at trial was not the truth and that much of this testimony was furnished to him by authorities. This declaration, without more, establishes good cause for discovery and an evidentiary hearing.[4]

b. Declaration of Robert Farr: Mr. Farr similarly puts to rest the issue of whether he acted as an informant and agent for investigator Huff in this case. He plainly states that he did so, and that he was paid by investigator Huff for his services. Moreover, he confirms that crucial, material portions of his trial testimony are untrue.[5] This declaration, without more, establishes good cause for discovery and an evidentiary hearing.

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[4] Unlike at trial, Mr. Cook has absolutely nothing to gain by submitting the affixed affidavit.

[5] Like Mr. Cook, Mr. Farr has nothing to gain by submitted this affidavit.

c. Declaration of Carol Cook: Ms. Cook confirms that, like her brother Charles Cook, she was told by authorities to testify about events she knew to be untrue. For example, while she recalled the car that she saw Mr. Cook and Mr. Banks ride in as being red, not green, she asserts that she was told by authorities to testify that the car was green.

d. Declaration of Marcus Jefferson: Mr. Jefferson confirms Mr. Farr's present account that it was Farr's idea, not Mr. Banks', to drive to Dallas to obtain a pistol. Moreover, he confirms that Mr. Banks made no statements indicating that he wanted a weapon to commit robberies.

e. Declaration of Vetrano Jefferson: Mr. Jefferson confirms that his penalty phase testimony was seriously misleading in that he, rather than Mr. Banks, was to blame for the fight they had that the state used to show Mr. Banks would likely be a danger in the future. He also confirms that investigator Huff used zealous tactics to bring him to court, and that Huff suggested that he give testimony that was not truthful.

27. In the wake of this new evidence, Mr. Banks submits that he is entitled to conduct discovery, and thereafter, to an evidentiary hearing on his prosecution misconduct claim. *Townsend v. Sain, supra; Bracy v. Gramley*, 117 S.Ct. 1517 (1997). The state is entirely responsibility for Mr. Banks' inability to present these facts in the state courts first because it suppressed them at trial and then by steadfastly denying their existence in later proceedings. Mr. Banks is entitled to and thus seeks leave to conduct the following discovery:

a. Deposition of Willie Huff

b. Deposition of James Elliott

c. Production of the following files:

- Investigator Huff's full and complete file for this case

- Investigator Huff's Bowie County personnel file
- Any law enforcement file possessing information that Huff has provided untruthful evidence in other cases, or was investigated for violation of state and/or federal law
- Any law enforcement file that possesses information concerning Robert Farr's informant status and career
- Investigator Huff's travel records from April 11 through October 2, 1980, and/or Bowie County sheriff department or other law enforcement files containing said information
- Bowie County District Attorney's office entire prosecution file for this case
- Any Bowie County District Attorney's file, or other law enforcement file, possessing information on Robert Farr's status and role as an informant in this case
- Any Bowie County District Attorney's file or Dallas County District Attorney's file possessing information of discussions between Dallas County and Bowie County authorities concerning Charles Cook and his participation as a witness at Mr. Banks' trial

Mr. Banks requests that the Court allow him 60 days to conduct such discovery, and that all requested files, papers, and documents be provided within 30 days, and that any necessary depositions take place within 30 days after receipt of such discovery. Mr. Banks reserves the right to request additional discovery depending upon what he learns from review of the requested files and testimony at the depositions. Mr. Banks will make every effort to complete all discovery by May 26, 1999 so that a June 7 & 8 evidentiary hearing may go on without delay.

II. The Ineffectiveness Claims

a. Relevant Procedural History

1. State Post-Conviction Proceedings: No Hearing or Adequate Resolution of Sharp Factual Disputes Between the Parties

28. In the most recent state post-conviction proceedings, Mr. Banks pleaded a comprehensive claim of trial counsel's ineffectiveness and alleged several unreasonable omissions by direct appeal counsel. In support of these allegations, Mr. Banks submitted by affidavit a considerable array of evidence which tended to show that failure to adequately investigate and prepare for either phase of trial, in combination with several errors during the trial itself resulted in Mr. Banks not receiving the type of legal representation the Constitution requires he receive in this capital proceeding.[6] Similarly, he offered testimonial support for his claim that direct appeal counsel's failure to raise several meritorious issues showed ineffective representation in that legal venue as well. In rebuttal, the Director filed with his answer the affidavit of the defense investigator, and referred to an affidavit from defense counsel Cooksey that was filed only months later and in a significantly different form.[7]

29. It is fair to say that Mr. Banks' claim, if found proven by credible evidence, would establish successful ineffective assistance claims, and that the parties sharp disagreement on the facts require a hearing and determination by the Court of which party has the better case.

30. The state court held no hearing, issued no findings, and concluded only that (1) "counsel for Appellant at trial did give the Appellant effective assistance of counsel throughout

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[6] See Exhibits to Petition for Writ of Habeas Corpus filed January 13, 1992.

[7] See Exhibits to Answer filed October 5, 1992.

all stages of the trial proceedings, including voir dire and pre-trial," and (2) "the Court concludes as a matter of law that Applicant did receive effective assistance of counsel on appeal." Feb. 22, 1993 Findings of Fact and Conclusions of Law at pp. 3, 7.

31. While the state court is free to dismiss fact-bound claims such as the ones pleaded by Mr. Banks without any hearing or findings, such summary resolution does not prohibit this Court from now hearing the evidence, making findings of fact, and reaching a conclusion that differs from the state courts.

b. Mr. Banks is Entitled to a Hearing

1. The State Court's Failure to Make any Findings on This Claim Mandates a Federal Hearing

32. This Court must hold an evidentiary hearing on these claims because the state court's failure to make fact-findings leaves this Court with no basis upon which to make a reliable determination of these federal questions. When a federal habeas court reviews a claim that has been presented to the state courts, the federal court must perform a *de novo* review of the state court's legal resolution of that claim. "It is the duty of the district court . . . to review *de novo* the legal conclusions reached on the basis of the facts." *Blackmon v. Scott*, 22 F.3d 560, 567 (5th Cir. 1994); *May v. Collins*, 955 F.2d 299, 315 (5th Cir. 1992); *Buxton v. Lynaugh*, 879 F.2d 140, 147 (5th Cir. 1989).

33. Typically, such review would be based on the factual findings made by the state court, which must be presumed to be correct. *See* former 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U. S. 539, 546-47 (1981). However, where the state court develops no factual record upon which the federal habeas court can base its legal conclusion, the federal habeas court must hold an evidentiary hearing. *See e.g., Goodwin v.*

Johnson, 132 F.3d 162, 184-85 (5th Cir. 1998); *Blackmon*, 22 F.3d at 567. In *Blackmon*, the court of appeals found that where the state courts entered no findings relating to a petitioner's Sixth Amendment *Massiah* claim, the district court could not deny relief without benefit of an evidentiary hearing. *Id.* The court concluded that the factual findings necessary to determine whether state agents had deliberately attempted to elicit incriminating statements from the petitioner could not be made in the absence of an evidentiary hearing. *Id.*

34. Similarly, in *Goodwin*, the court stated that "[b]ecause the state courts made no fact-finding on the [relevant] issue, they did not provide [petitioner] with a full and fair hearing for its resolution." The Court described the general principle that "'[w]hen the state court did not resolve a fact issue that would entitle the petitioner to relief if resolved in his favor, the petitioner is entitled to an evidentiary hearing on this issue. *Id.* at 183. The court recognized this principle in *Armstead v. Scott*, 37 F.3d 202, 210 (5th Cir. 1994), where it noted that "ordinarily it would remand this case to the district court for a hearing [on the disputed issues] . . . because no finding was made as to that issue." *See also Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996)(finding that petition was entitled to evidentiary hearing where state court's findings of fact were not entitled to presumption of correctness and petitioner's allegations, if true, would have entitled her to relief).

35. Although Mr. Banks presented numerous allegations and supporting evidence before the state court in support of his ineffectiveness claims, the state court made no fact findings. It made only the broad, sweeping legal determineation that neither counsel's services fell below constitutional standards. But the state court's legal conclusion is not entitled to any presumption of correctness. *See Thompson v. Keohane*, 516 U.S. 99, 111 (1995)(finding that the effectiveness of

counsel is a legal question and not to be given a presumption of correctness under former 28 U.S.C. § 2254(d)). The state court therefore made no express findings that this Court may rely on in determining whether Mr. Banks' counsel satisfied constitutional requirements:

36. Moreover, the court may not rely on any implicit factual findings that were arguably necessary to the state habeas court's ultimate conclusion. The court of appeals has made clear that a federal habeas court may give a presumption of correctness to implicit findings only in the most limited circumstances. In *Salazar v. Johnson*, 96 F.3d 789 (5th Cir.1996), for example, the district court was reversed for relying upon an implicit finding. Salazar asserted in an affidavit that his counsel failed to inform him of his appellate rights. *Id.*, at 791. The assertion was not disputed by the affidavit presented by respondents. "Nevertheless, the district court states that the state court 'implicitly found' that Salazar was informed of his appellate rights." *Id.*, at 792. The Fifth Circuit found that attaching a presumption of correctness to this supposed implicit finding was erroneous and remanded the case for a factual finding on this issue. *Id.*

37. In *Armstead v. Scott*, 37 F.3d 202, 208, the state court dismissed a petitioner's ineffectiveness claim on the grounds that the affidavit filed by the petitioner's trial counsel, which the state court found to be credible, denied each of the factual allegation in the petitioner's affidavit describing the basis of the claim. The affidavit from trial counsel, however, did not address the issues of a false promise made by trial counsel—an issue raised by petitioner in his affidavit. Accordingly, when the state court stated that it found that trial counsel's affidavit was correct, no factual findings were made regarding the false promise. Even though the ultimate conclusion of the state court may have implied a finding regarding the false promise, the court of appeals concluded there was no finding to which a federal court could defer.

38. In those instances where federal courts found a state court's legal conclusion may form the basis for findings of fact, the state court's ruling addressed a discrete issue and the factual basis for the ruling was straightforward and clear. *See Goodwin*, 132 F.3d at 184 n.16 (collecting cases). This is not such a case. The factual basis for Mr. Banks' claims are extensive. The state court's one sentence legal conclusion simply does not make it possible to reconstruct any unexpressed findings of fact. *See Townsend v. Sain*, 372 U.S. 293, 314 (1963).

39. The state court therefore produced nothing to which this Court can defer as it approaches its task of reaching its independent determination regarding the ineffective assistance of counsel claims.

c. *The State Courts' Failure to Afford Mr. Banks a Full & Fair Hearing Mandates an Evidentiary Hearing*

40. The Court must hold an evidentiary hearing because the "hearing" held in the state proceeding was wholly inadequate. It is well established that "[t]he opportunity for an evidentiary hearing in a federal habeas proceeding is mandatory only where there is a factual dispute which, if resolved in the petitioner's favor, would entitled the petitioner to relief and the petitioner has not received a full and fair hearing in state court." *East v. Scott*, 55 F.3d 996, 1004 (5th Cir. 1995); *Goodwin v. Johnson*, 132 F.3d 162, 178 (5th Cir. 1998); *Monroya v. Scott*, 65 F.3d 405, 417 (5th Cir. 1995); *Amos v. Scott*, 61 F.3d 333, 346 (5th Cir. 1996); *Wiley v. Puckett*, 969 F.2d 86, 98 (5th Cir. 1992)(noting that this standard applies equally to ineffective assistance of counsel claims). A "full and fair" evidentiary hearing occurs were the material facts—those facts crucial to a fair, rounded consideration of petitioner's claim—are adequately developed. *Townsend*, 372 U.S. at 312-13.

41. Mr. Banks has already discussed one sufficient reason for concluding an evidentiary hearing is necessary: the absence of any factfinding. Other equally sufficient ones exist as well.

42. The "hearing" that Mr. Banks was affording allowed for no presentation of live testimony, but only submission of affidavits. While "paper" hearing may provide for the adequate airing of facts and their reliable consideration in some cases, that is not always the case. Thus, "it is necessary to examine in each case whether [such a hearing] is appropriate to the resolution of the factual disputes underlying the petitioner's claims." *May*, 955 F.2d at 312. The court of appeals has found on numerous occasions that state factfinding based solely on competing affidavits should not be afforded a presumption of correctness because such a hearing is not full and fair.

43. The circumstances of this case demonstrate clearly the absence of a full and fair adjudication of the claims. There is no doubt that Mr. Banks presented considerable evidence in support of his claim; this quantum of proof contrasted sharply with the two affidavits submitted by the Director. Mr. Banks' submissions addressed numerous issues not dealt with at all by the Director's, and in some areas, disputed sharply respondent's representations. Credibility issues were raised, but none were resolved by the state court. Moreover, the Director relied in his answer on an expansive affidavit he allegedly presented to trial counsel to sign, but which counsel ultimately refused to execute.

44. These circumstances—considerable proof offered by Mr. Banks and far less offered by the Director—makes this case like *Netherly v. Collins*, 993 F.2d 1154, where the court of appeals found a paper hearing to be inadequate. There, the petitioner claimed that the trial judge was tainted by his failure to disclose a close personal relationship with the deceased victim. The trial judge submitted to the state habeas

court an affidavit stating that he was not personally acquainted with the victim. The petitioner submitted an affidavit from a friend who claimed to have heard the judge profess a friendship with the victim. The state court conducted no evidentiary hearing and adopted the state's proposed findings of fact. The court of appeals determined these findings were not entitled to a presumption of correctness because the findings "did not follow on the heels of a full and fair hearing." The court found it significant that the state habeas judge was not the trial judge and that petitioner's version of events was not so facially insubstantial as to render a hearing a mere gratuitous formality.

45. Moreover, this case is distinct from those where a paper hearing was found to be adequate. Many concern issues in which the proffered evidence was uncontradicted. For example, in *Uresti v. Lynaugh*, 821 F2d 1099 (5th Cir. 1987), the petitioner submitted no evidence relevant to his claim of ineffective assistance of counsel to the state habeas court and the trial counsel's affidavit directly addressing the relevant issues stood uncontradicted. Clearly, no factual dispute existed that required resolution through a live hearing. Similarly, in *Evans v. McCotter*, 805 F.2d 1210 (5th Cir. 1986), in the context of a present insanity claim, the state habeas court was presented with five detailed affidavits from the state concerning petitioner's health, and only one general and conclusory one from petitioner's sister asserting he was insane and incompetent. Again, the petitioner's evidence failed to raise a material dispute regarding petitioner's insanity. As a result, the required factual findings did not suffer from the absence of an actual evidentiary hearing. In fact, the court found that petitioner's affidavit was too conclusory to even raise a fact question as to his sanity and only, alternatively found that the procedure was adequate. Concerning ineffectiveness claims, in *Smith* v. *Estelle*, 711 F.2d 677 (5th Cir. 1983), the court determined that a paper

hearing was adequate but again only because the petitioner's submissions failed to raise a significant factual dispute.

46. Furthermore, paper hearings have been found inadequate where a state court finds in favor of a party whose evidence fails to address necessary issues. *See Salazar*, 96 F.3d at 792. There the court found, when reviewing an ineffective assistance of counsel claim, that the factual findings in favor of the warden that were not supported by the record could not be afforded a presumption of correctness. As a result, the case was remanded to the district court for the purpose of making relevant fact findings.

47. Such obvious limitations on fact finding from paper records has been noted by the Supreme Court. In *Cabana v. Bullock*, 474 U.S. 376, 388 n.5, the Court found that an issue of whether the defendant possessed the requisite intent to kill would often turn on credibility determinations that could be reliably made only after a live hearing.

48. For all of these reasons, the "paper" hearing afforded Mr. Banks' meritorious ineffective assistance of counsel claims in state court failed to adequately resolves these issues. Thus a full and fair resolution is warranted in this Court.

III. The Swain Claim.

a. Relevant Procedural History

1. State post-conviction hearing: petitioner was repeatedly denied necessary funds to confirm race of venirepersons and factfinder was neither neutral nor detached

49. Mr. Banks pleaded claims of systematic exclusion of African-Americans from jury service in Bowie County twice—in his first and then in his third state habeas petition. After he submitted a large volume of unrebutted evidence in support of this claim in the third proceeding—and after that court refused repeatedly to rule on motions for discovery and requests for funds for expert and investigative assistance—the trial court denied his request for relief. Thereafter, the Court

of Criminal Appeals remanded the case back to the trial court for an evidentiary hearing on this issue. Prior to that hearing, Mr. Banks asked the trial court to recuse himself; the court refused to do so. Mr. Banks also reasserted motions for discovery and for funds. Again, the court made no funds available to Mr. Banks for expert and investigative services, but did *grant* the state's motion for funds for its own statistical expert.

50. Thereafter, in ruling on this claim, the court found no meritorious *Swain* claim, in part because it held that the method by which Mr. Banks determined the race of numerous venirepersons was not sufficiently reliable. Lacking funds solely due to the court's refusal to act on his request for those funds, Mr. Banks was forced to confirm racial identity by consultation with longtime residents of Bowie County. In the court's words, "the following facts erode the accuracy and reliability of the statistical data; . . . blacks were identified on veniresheets by witnessses who gave sincere, but unscientific guesses at racial identification . . . " July 22, 1993 Findings of Fact and Conclusions of Law, para. 28.

2. Current posture of claim

51. Mr. Banks is now in a position to submit evidence that will establish beyond doubt the race of these venireperson. This evidence will confirm that the racial identification evidence submitted in state court is correct, and will demonstrate that the data underlying this serious claim is solid and reliable. It will thus remove any doubt about the reliability of the stark pattern of peremptory striking that Mr. Banks submits establishes a meritorious claim under *Swain v. Alabama*, 380 U.S. 202 (1965).

52. Mr. Banks seeks leave pursuant to Rule 7 of the Rules Governing Section 2254 Cases to supplement the record with two affidavits: one from the paralegal who performed the exacting task of actually confirming the race of each relevant venireperson, and from Mr. Banks' statistical expert from the

state court proceeding. Dr. Kent Tedin, who will affirm that the new data confirms the accuracy of the data upon which he based his conclusions at the state hearing. One purpose of Rule 7 is to provide a vehicle for the submission of evidence that the parties find does not require adversarial testing. Should the Director object to this procedure, Mr. Banks is prepared to call both witnesses at an evidentiary hearing.

WHEREFORE, for the reasons given above, and for others apparent to the Court, Mr. Banks prays that the Court grant his motion for discovery and for an evidentiary hearing as modified in this submission.

Respectfully submitted,

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Delma Banks, Jr.

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,
vs.
GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

Exhibits to Reply

Declaration of Charles E. Cook

Declaration of Robert Farr

Declaration of Carol N. Cook

Declaration of Marcus Jefferson

Declaration of Vetrano Jefferson

County of Dallas
State of Texas

Declaration of Charles E. Cook

1. My name is Charles E. Cook. I am more than 18 years of age, and give this declaration freely and voluntarily. I declare that the contents of this statement are true.

2. In September of 1980, I testified as a state's witness in the case of *State of Texas v. Delma Banks*, (No. 80-F-86), a capital case that was tried in Bowie County, Texas. Prior to the trial, I had no contact with representatives of Mr. Banks but spoke extensively and often with the trial prosecutors—Mr. Raffaelli and Mr. Elliott—as well as with Bowie County Deputy Sheriff Willie Huff and other members of the sheriff's department. Mr. Huff served as the chief investigator on this case. At the conclusion of the trial, Mr. Banks was found guilty of capital murder and was sentenced to death.

3. In the years since this case, I have on several occasions been approached by representatives of Mr. Banks who have wished to interview me about my knowledge of the case and my trial testimony. On all but one of these occasions—until now—I have refused to say a word. The one exception was during January, 1992, when I spoke for a few hours with an investigator from what I understood to be the Texas Resource Center. After that conversation, I refused to again speak with that person, and also refused to sign an affidavit that had been prepared for my signature.

4. In early July, 1998, I was again approached by a representative of Mr. Banks, a Dallas-based investigator named Ben Leonard. At the time, I was an inmate at the Hutchins Unit correctional facility in Hutchins County, Texas. Mr. Leonard indicated that he wished to speak to me about Mr. Banks' case, and on this occasion, I agreed to talk with him about it in general terms. Mr. Leonard impressed me

as sincere and honest, and I informed that I would consider meeting again with him and other representatives of Mr. Banks.

5. After Mr. Leonard's visit, I thought long and hard about whether I wanted to speak in more detail about this case. I finally agreed to do so after I concluded I could no longer conceal that much of my trial testimony was not true. It was a scripted event that was forced upon me by Deputy Sheriff Huff and the trial prosecutors. During the months leading up to trial, I was facing a felony charge of arson, and the state had filed habitual offender papers, which meant that upon conviction I would receive a life without parole sentence. Mr. Huff and the others made it very clear to me on numerous occasions that I would receive such a sentence if I did not testify against Mr. Banks as they wanted me to. Given this choice, I agreed to testify falsely to certain events and matters in exchange for dismissal of the pending arson charge and habitual offender papers. It is my intent in this declaration, once and for all, to set the record straight.

6. On April 12, 1980, I met Delma Banks in front of my house in Dallas. Prior to this time, I had never before met Mr. Banks. He told me that he had just arrived in Dallas, was thinking about moving here, and asked if I could aid him in finding a place to stay. As this was a Saturday, and I did not have to be at work, I agreed to assist him. I spent much of this day with Mr. Banks, and all of the following Sunday. Mr. Banks remained in Dallas on Monday, and after work, I accompanied him to the bus station whereupon he took a bus back to Texarkana.

7. In the early morning hours of April 24, 1980, I was at my grandparents home, and I heard a knock at the door. A tall dark guy in his thirties asked "do you have the pistol." I told him that I didn't know anything about a gun. At the same time, I heard a helicopter in the sky above. The man left. Shortly thereafter, several plainclothes police rushed into the

house shouting "where is the fucking gun?" One of these officers was Willie Huff. This was the first time that I met Huff. I spoke to the officers briefly upstairs so that my grandparents would not be disturbed, and shortly thereafter, the police took Rita and I downtown for questioning. Once there, Rita and I sat with Deputy Huff and another investigator, and Huff explained that Delma Banks had killed a young white man in Texarkana. He was exited and agitated, and used harsh language. For example, he told me "nigger, you had better tell us the truth or it is your ass." He accused me of helping to get rid of the murder weapon, and that I could be charged as an accessory to murder. He also accused me of selling the car that he said Delma took from the victim, and said "we know you sold the car. We are going to take your black ass to jail if you don't tell us to who." He made it very clear that cooperation was my best and only option. His demeanor and blunt language scared me nearly to death. I had twice been in the penitentiary, and knew if I returned that I would be there for a very long time.

8. While at the station, I gave a statement- that was incomplete and inaccurate in numerous respects. I did so only because I was terrified of Huff, felt I was about to be charged with this crime, and wanted to please him. Shortly thereafter, he drove Rita and I back to my grandparents home, and he and I went to my neighbor Benny Lee Jones' house to get the gun. Jones gave us a gun that was a .25 automatic. I do not know much about guns, and thus don't know whether this is in fact the gun that I had obtained from Delma and later sold to Jones.

9. Three weeks later, in the middle of May, I was locked up in Dallas on the arson charge. That charge originated from a misunderstanding with my sister. She was living with a man who was regularly beating her; in order to get him to stop, I lit the back door on fire. Shortly afterwards, my sister filed an affidavit which informed authorities that she did not wish to

press these charges further. This affidavit was ignored and I remained in jail.

10. Shortly after my incarceration, I was taken by Deputy Huff and another Texarkana law enforcement official to the Bowie County jail for the first of several pretrial practice sessions. Huff and the two trial prosecutors were present. They made it very clear that this case was very important, that I would testify as they wanted me to, and that I would spend the rest of my life in prison if I did not. They repeatedly told me how to say things, and insisted repeatedly that I testify about events that were not true. For example, Huff and the others told me I had to say that Delma "wanted to know what it was like to kill a white boy." I was also told to say that Delma drove over the victim's legs with the car after the shooting. Delma never said these things to me. Moreover, Delma never gave me any details about the shooting. Often during these sessions, Huff and others would scream at me, and make it very clear that I would say things the way they wanted it said or I would spend the rest of my life in prison. I can still hear them telling me if I complained that something that they suggested I say was not true, "yes it is nigger, that is what you are going to say."

11. It is my recollection that I participated in three or four of these practice sessions prior to the real trial. On each occasion, Deputy Huff and other man would take me out of the Dallas County jail and take me to Bowie County. I would stay in Bowie County for a few days, and Huff would return me to the Dallas jail after the session. On one of these occasions, Huff gave me beer on the return trip; on other occasions, he gave me $10 or $20 dollars at the end of the trip.

12. In August, I learned that habitual offender papers were filed against me in the arson case. A few days afterwards, Huff came to Dallas and told me about these papers. He made it very clear that the arson charge and habitual offender

papers would disappear if and only if I testified as he wanted at the trial. This filing made it crystal clear to me that if I did not do as they wished, it was a certainty that I would never again be a free man.

13. Just prior to trial in September, Huff informed me that several members of my family and I would travel to Texarkana for the trial, and that we would stay in a motel until the trial's completion. Huff said we would stay at a nice motel, and that I would be able to stay with Rita so that I could—in his words—"get some pussy." In exchange, he said, "you have got to do something for us." He said I had to say that Delma had killed the white boy for the hell of it. On this same day, Huff got me out of the Dallas jail, drove me home, and allowed me to have a conjugal visit with Rita.

14. When it came time to go to Texarkana, my family and I rode in a caravan. When we arrived at the motel, my family entered the motel, but Huff stopped me and said I would be staying at the jail. I was angry but Huff said we had to make it look right. I was held at the jail for four or five days. On each day, Huff got me and took me to the motel so I could see my family and have conjugal visits with Rita. He would stand outside Rita's room while she and I had sex. Huff also brought me food daily because I refused to eat the jail food.

15. At the trial, I did not testify truthfully. Instead, I testified consistently with the script that I had been drilled on to follow. Among other things, I did not testify truthfully when I said (1) that I saw blood on Delma's leg on the Saturday when we first met; (2) that Delma had said on Saturday morning that he had harmed a white boy; (3) that Delma gave a description of how the victim was shot and that he had run over the victim's legs with the car; (4) that Delma wanted to know what it was like to kill a white person, and (5) that he wanted to kill someone for the hell of it. I testified to these and other matters that were not the truth only because I was under extreme duress from Deputy Huff and the

prosecutors. I had to choose between the truth and freedom, and I chose freedom.

16. Immediately after the trial concluded, Deputy Huff, ushered me out of the courthouse. My family and I left for Dallas shortly thereafter; I rode alone with Huff. To my relief, Huff was true to his word. He took me directly to the Dallas County Jail, and on October 2, 1980, the day after Delma's trial concluded, the arson charge was dropped and I was released a free man.

17. The last time I saw-Deputy Huff was when he dropped me off in Dallas after the trial. He reached into his pocket and gave me $50. He told me "you know what will happen to you if you tell people what really happened." This was a threat and warning that I would be in danger if I told anyone that I had lied at his request at the trial.

18. For 18 years, I have kept this secret to myself because I believed Huff then and I continue to believe that he will harm me and my family if I tell the truth. While I remain very fearful of Huff and others in law enforcement who could act at his request, I cannot keep these secrets any longer. I now realize that the lies I told contributed significantly to putting Delma Banks behind bars and on death row. If he in fact belongs there, it should be only as a result of testimony that is truthful. I declare under penalty of perjury that the foregoing is true and correct. Executed on August 19, 1998.

/s/ Charles E. Cook
CHARLES E. COOK

DECLARATION OF ROBERT LEE FARR

County of San Bernardino)

)SS **Declaration of Robert Lee Farr**

State of Califomia)

I declare, under penalty of perjury, that the following is true:

1. My name is Robert Lee Farr. I currently live in California. I am over eighteen years of age. I have read this document and believe everything written in it to be true.

2. I testified at the capital murder trial of Delma Banks, Jr. in Texarkana, Texas in September of 1980.

3. Both before and after Delma was arrested for killing Richard Whitehead, I worked as a police informant for the Bureau of Alcohol, Tobacco, and Firearms; the Texas Department of Public Safety; and the Texarkana, Texas police department. For several years, I supplied information to police officers to help them make cases against drug dealers, a doctor, and pharmacists in Texas and Oklahoma. The ATF agent I worked for was in Oklahoma. The Texas DPS officer I worked with was Dale Hampton in Texas. Sometimes the police agencies paid me money for my work. The police also would let me falsify prescriptions for drugs that I was addicted to without arresting me because of my work for them. Several of the police officers knew that I sold pills.

4. I did not know Richard Whitehead. The only thing I knew about his murder is what I saw in the news. It was a very high profile case and was reported on the TV and in the newspapers constantly.

5. About one week before Delma's arrest, Willie Huff, a police officer with the Bowie County Sheriffs Department, asked me to work for him on his investigation of Delma. Willie stopped me outside my doctor's office

and asked me to get into his car. While I sat in his car, Willie asked me to help him with a case. He did not tell me that this case had to do with Richard Whitehead's murder.

6. I assume Willie Huff came to me because I was married to Sharon Jefferson, Delma's girlfriend's sister, and so I knew the same people Delma knew. Like a lot of other policemen in the Texarkana area, Willie knew that I used and sold pills with false prescriptions. I assumed that if I did not help him with his investigation of Delma that he would have me arrested for drug charges. That's why I agreed to help Willie. I was afraid that if I didn't help him, I would be arrested.

7. Willie first asked me if I knew Delma and I said yes. Willie Huff asked me to help him find Delma's gun. I told Willie that he would have to pay me money right away for my help on the case. I think altogether he gave me about $200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder. He said that the case was worth a lot more than that to him. He did not tell me at that time that Delma was a murder suspect in the case of Richard Whitehead. He only told me that he wanted me to help him find Delma's gun.

8. In order to help Willie Huff, I had to set Delma up. I told Delma that I wanted to rob a pharmacy to get drugs and that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so that he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery. That's when Delma told me his gun was in Dallas. I convinced Delma to drive to Dallas with me to get the gun.

9. After I convinced Delma to give me his gun, I called Willie Huff and told him that Delma's gun was in Dallas. I also told Willie that Delma and I were going to drive to Dallas to get the gun. I knew that Willie would follow us to Dallas because he told me during that conversation that he would follow up. This was the third or forth conversation I had with Willie.

10. Delma, Marcus Jefferson and I drove to Dallas in my car. I had drugs with me. When we got to Dallas, we stopped at a man's house and Delma went to the house and came back with a gun. After we drove away from the house, our car was pulled over by the police on the interstate. I was taken to the Dallas police station with Marcus. I don't know where Delma was taken because he was in a different police car. I was allowed to leave. I wasn't charged with anything.

11. While I was at the Dallas police station, I saw Bowie County D.A. investigator, Charlie Leathers. He told me that Delma was going to be charged with murder because they had found the murder weapon. I asked Charlie for money to help me get home and he gave me about $25.00. Charlie knew that I had convinced Delma to go to Dallas because Willie Huff had asked for my help. I knew that Charlie and Willie were working together on the investigation of Delma.

12. At some point before Delma's trial, the District Attorney's office asked me to come by to look at two guns that they had. Both the District Attorney Louis Raffaelli and Charlie were there. They asked me if I recognized either of the guns, and I told them that I did not.

13. Less than a year after my testimony at Delma's trial, I left Texarkana, Texas. During my years as a police informant, I had helped the police put a lot of people

away on drug charges. I had been paid for my work. I left because the people I had helped the police put away found out that I was a police informant. I was afraid of them. Also, Dale Hampton told me that I should stop working for the police because my life might be in danger. Because of all this, I am afraid to return to Texarkana, Texas because I fear for my life.

I have read the above paragraphs, numbered one through thirteen and declare under penalty of perjury that the foregoing information is true and correct.

Executed on November 4, 1996.

/s/ Robert Lee Farr
ROBERT LEE FARR

WITNESSED BY:

/s/ Tena B. Francis
TENA B. FRANCIS

County of Dallas
State of Texas

DECLARATION OF CAROL N. COOK

1. My name is Carol Nadine Cook. I reside in Dallas, Texas. I am more than 18 years of age and make this statement freely and voluntarily. The contents of this declaration are truthful.

2. My brother is Charles Cook. In 1980, he testified in the capital murder trial of *State of Texas v. Delma Banks, Jr.*, in Bowie County, Texas. I also testified briefly in the trial.

3. I met Delma Banks on Saturday, April 12, 1980. I was at my home in Dallas caring for my third son who was born the week earlier, on April 6. Charles drove to the house with a man he introduced as Delma Banks. I had not met him previously. The car they were riding in was a red mustang. I remember the car because Charles did not own a car at that time.

4. Charles and Delma stayed for about 45 minutes. Delma struck me as polite. Thus, I was surprised to learn of Delma Banks' arrest for murder in Dallas the next week.

5. Shortly after Delma's arrest, I had my brother Charles arrested for arson. He threw a small gasoline bomb at my kitchen when my kids were in the house. The fire company had to come and put the fire out. When I learned afterwards that Charles had taken this drastic action to help me—I was then living with a man who—was beating on me—I asked the Dallas authorities to drop this charge. They refused to do so.

6. In August, 1980, Bowie County Deputy Sheriff Willie Huff came to Dallas and me with me and my family. He told us that we were going to have to testify in September at the Delma Banks trial. I did not understand why because I had not witnessed the crime nor know anything about it. My grandparents felt the same way. Nor did we have the money to travel to Texarkana and stay for the trial. Huff also did not

tell us how our testimony would be useful or relevant to the case. Shortly thereafter, he returned with subpoeneas for me, my grandparents, and for Charles' common law wife, Ida (Rita) Marie Martin. He told us we had to testify at the trial. He was unpleasant and rude to us. At this time we learned for the first time that the state would pay our travel expenses, and put us up in a motel. Charles and Ida Marie were present at this meeting with Huff at my grandparents house, and Huff told Charles that he would be staying at the hotel as well.

7. We were driven to Bowie County in September for the trial by Bowie County deputies. When we checked into the hotel, Charles was not allowed to do so. He was taken to the local jail. But during our stay, he was driven back to the hotel by deputies hotel so he would see Ida in her room. The deputies snuck him up the back way so that no one would know he was in the hotel.

8. Prior to my testimony, Huff and the prosecutors told me what they were going to ask me and what answers I was to give. I remember Huff told me to say the car I saw was green, when I recalled it was red. He insisted I say green. On the witness stand, when I was asked this question, I first said red, but then changed my answer to green. I testified the car was green only because Huff had scared me to say it was green. I remain certain today that the car I saw that day was red, not green.

9. Immediately after the trial, Bowie County deputies took me and my family back to Dallas. While Charles had been held in jail for several months prior to the trial on the arson charge that I did not want to pursue, that charge was dismissed as soon as we got back to Dallas.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 1998.

/s/ Carol Nadine Cook
Carol Nadine Cook

State of Texas
County of Bowie

Declaration of Marcus Jefferson

1. My name is Marcus Jefferson. I reside in Texarkana, Texas. I am more than 18 years of age and make this statement freely and voluntarily. The contents of this declaration are truthful.

2. I know Delma Banks. In the late 1970s, he began to date my younger sister Demetra Jefferson. He and Demetra later had four children together.

3. In early April 1980 my older brother Vetrano and Delma got into a fight. During this fight, Delma hit Vetrano across the face with a pistol. Back then, Vetrano was a real hot-head, he liked to drink a lot and to fight. Delma was just the opposite in that he was quiet and rarely drank.

4. A couple of weeks after this incident, Robert Farr, my eldest sister Sharon's husband, said he wanted to speak to Delma and I. Before this I had not really spent much time with him and did not know him real well. On the few occasions I had been with him before he was strung out on drugs. I knew that he dealt drugs at this time, mainly Dilaudin or 'D's, and he was always shooting up. When he shot up he would get real spaced out. On one such occasion, Farr was high on drugs and drove up the back of a stopped car at a drive-thru liquor store. He was so high he got out and blamed the other driver.

5. Farr said he had an idea about how he and us could make some money. He said he knew a liquor store that he could rob, and said "all I need is a gun". Delma said that his gun was in Dallas and Farr urged Delma that we all drive to Dallas to get it. I had never been to Dallas and was excited about going on a road-trip. I did not really think about what would happen once we had got the gun. Farr never said

which liquor store it was and I thought it was too late to rob anything that night.

6. Delma and I agreed to go to Dallas late that evening, and we all got into Farr's car. Before we left Texarkana, Farr said he needed to do something and so we stopped on College Hill, I believe at a 7-11, and he made a telephone call. He also shot up some drugs.

7. We then set off for Dallas. Delma drove as Farr was too spaced out. We stopped once more at Hook's truck stop on Interstate 30 and filled up with gas. Farr went into the station, paid for the gas, and bought some snacks.

8. There was almost no conversation during the drive to Dallas. Delma was concentrating on driving, Farr was too high to talk and I dozed some.

9. After arriving in Dallas, we drove to a house and Delma got out and went to the door. I am not sure how long he was up there but it was a while. Farr was still high at this time. When Delma got back to the car he said "this man ain't got my gun; some one else has my gun, and he gave me another one." This was the only thing Delma said about a gun. He made no references at all to committing robbery. Also, Delma never said that he would take care of any trouble at any robbery nor did he ask if the gun he had been given would be adequate for the job.

10. We got lost on the way back and got on the Interstate going west, not east toward Texarkana. We turned around (legally), and as soon as we were heading in the right direction, Delma said "the police are behind us." Although surprised, Delma was calm and cooperative, just as if we were going to get a ticket although as far as I could tell we had not broken any traffic laws.

11. Delma pulled the car over and got out. Farr did not exit because he was still high, and I was trapped in the back seat.

The police began to holler at us to get out and pointed shotguns through the back window. I yelled at Farr to get out as I was terrified the police would shoot me. I got out immediately after Farr got out.

12. There were an awful lot of police cars about. I was cuffed and put in one car and Delma and Farr were put in another. I was taken to a police station and kept in an interrogation room in cuffs. No-one asked me any questions other than one officer who was watching me who offered me a smoke. He asked me some questions about fishing and where I like to fish. I told him Wright Patman lake and the Millwood dam.

13. About seven or eight in the morning the police let me go and Farr and I drove back to Texarkana in Farr's car.

14. The idea to go to Dallas in the first place, to obtain a gun, and to commit a robbery, were Farr's ideas alone. I never thought about robbing anyplace or anyone, and I never heard Delma say he wanted to rob anyone or anyplace. We foolishly decided to go that night to help out our brother-in-law (Farr).

15. I have not spoken with any representative of Delma Banks until 1998. [I have not spoken to Delma since his arrest in 1980.] I did not want to get into this because I was afraid that I could be put in jail. I have decided to give this statement now because it is the truth and because I don't think the jury heard all the truth at Delma's trial.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 27, 1998.

/s/ Marcus Jefferson
Marcus Jefferson

State of Texas
County of Bowie

Declaration of Vetrano Jefferson

1. My name is Vetrano Jefferson. I am a resident of Texarkana, Texas. I am more than 18 years of age and make this statement freely and voluntarily. The contents of this declaration are truthful.

2. I know Delma Banks. I came to know him during the late 1970s when he began to date my younger sister, Demetra Jefferson. He and Demetra later had four children together.

3. I was not a close friend of Delma. Prior to his incarceration in 1980, he and I did not spend much time together. Indeed, I have not spoken to him since he was arrested for the Whitehead murder in 1980. Nevertheless; I would say that we had a good relationship other than the one incident that I testified about at his trial and which I describe in more detail below.

4. In early April, 1980, I was at Demetra's house one day; Delma and my older sister Sharon Jefferson were also present. I had been drinking wine throughout the day, and at some point, Delma and I began to argue. This dispute began as a result of some disrespectful comments I directed toward Demetra, who at that time, was pregnant. Delma did not like the comments and asked me to stop. I did not and instead, as I was drunk, grew angry. We began to fight. During the fight, because I was beating him, Delma hit me on the side of my face with a gun. The gun that Delma hit me with was a little thing, I think a .22. It had a chrome finish and a white pearl type handle. I had seen Delma carry this pistol on prior occasions. This blow opened a gash on my cheek. I went to the bathroom, and cleaned the wound.

5. I left the house, and Delma and others soon came out as well. When I reached the car, I opened the trunk to get a screwdriver. I did this because I could start my car only with this tool as the key would not turn. When Delma saw me

reach into the truck, he threatened me. I believe he did so because he could see I was angry and thought I was reaching for a weapon. My sister Sharon finally split us apart and I then drove to my parents' house. I was so angry at Delma when I arrived there that I grabbed my father's shotgun. Luckily, my parents disarmed me before I would leave the house.

6. That evening, my parents and I went to the Sheriff's office and swore out a warrant on Delma.

7. No police officer or anyone from the DA's office ever came to speak to me about this incident. After a short while, I decided to forget about it and let things lie.

8. About two or three days before I testified in Delma's trial, I was asleep in bed when I heard someone banging on my door and calling my name. I was still pretty much asleep and did not think anything of it until 2 police officers, one of whom was Deputy Sheriff Willie Huff, entered my room and shook me awake. Huff gave me a subpoena and said I had to come testify against Delma. Because I believed he was talking about when Delma had hit me and I had decided to let that lie, I said I would not go. Huff then arrested me, took me to the police station, and put me in a cell.

9. After a while Huff came and got me, took me into his office, showed me rusty looking, black, automatic .25 pistol, and asked if this was the gun Delma had used to hit me. When I told him it was not he put me back into my cell. Huff had me brought to his office on a couple of other occasions and asked me the same thing. I always told him the gun he was showing me was not the gun that Delma hit me with. He wanted me to say this was Delma's gun, and got very angry when I refused to do so. I believe this is the main reason I was kept in jail before my testimony.

10. I didn't really know much about Delma's murder case because, at that time, I was drinking heavily, and keeping to myself. In fact, I knew nothing about the Whitehead murder. I

remember I was surprised to learn that Delma had been charged with it as other than when we fought I had never heard of him getting into any fights or any sort of trouble. He was not much of a drinker and rarely drank at all.

11. I don't recall anybody else coming to talk to me about Delma's case prior to his trial. In particular, Delma's attorney and investigator, Lynn Cooksey and Dennis Walters, never came to talk to me about anything. At that time, I would have been willing to talk to them about what I knew about Delma, and to let them know that the fight we had was my fault, not Delma's.

12. I was in jail about 2 or 3 days before testifying in Delma's trial. After I finished they let me go.

13. During the spring of 1980, I was hanging out with Robert Farr quite a bit. He was Sharon's husband and they were living on Baltimore Street which was about 10 blocks from where I lived.

14. I knew that he was dealing drugs. I was with him on several occasions when he sold pills. People would either come to his house or he would go to them.

15. Farr got his pills by filling out false prescriptions and by getting doctors to prescribe him pills as he had a bullet lodged in his head. On a couple of occasions Farr used me to go and get prescriptions for him.

16. During the past several years, representatives of Delma Banks have attempted to speak with me about these events. I have not agreed to speak with them until recently because I did not want to get into this again. I have agreed now to speak because I believe the court should have all the facts about the case that I know.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Vetrano Jefferson
Vetrano Jefferson
11-20-98

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

ORDER ESTABLISHING ISSUES FOR EVIDENTIARY HEARING

COMES on to be heard the parties' Responses to the Court's Order of January 21, 1998, (Docket #70), requesting that the parties identify issues for presentation at the evidentiary hearing scheduled for June 7 and 8, 1999. The Court having considered the Responses of the parties, to said Order, along with the other pleadings and the record filed in this case finds as follows:

Petitioner contends that he should be allowed to present evidence on three distinct issues, namely (1) whether Petitioner's Fourteenth Amendment rights were violated by the state witholding "crucial exculpatory and impeaching evidence concerning at least two important witnesses—Charles Cook and Robert Farr," *Brady v. Maryland*, 373 U.S. 83 (1963), (2) whether Petitioner recieved ineffective assistance of counsel at trial and on appeal on various issues, and (3) whether Petitioner's Fourteenth Amendment rights were violated by the state's longtime practice of peremptorily removing African-American jurors from felony cases. *Swain v. Alabama*, 380 U.S. 202 (1965). The Respondent stands by

his assertion that Petitioner is barred from further factual development of his claims, because he has had an adequate opportunity to develop the factual background in state court.[1] The Respondent states that Petitioner has failed to show that he was prevented from pursuing factual development of these claims in the state habeas proceedings. The Court will address the three submitted issues in the order presented.

Discussion

A habeas petitioner, challenging a state conviction, cannot pursue further factual development of a claim in federal court unless he was denied a "full and fair hearing in state court" on the issue at hand. *Green v. Johnson*, 160 F.3d 1029, 1047 (5th Cir. 1998). No hearing is required where the record is complete and the Petitioner raises only legal claims. *Id.*

1. *Brady Claim:* Petitioner asserts that the state violated his Fourteenth Amendment rights by witholding exculpatory and impeachment evidence concerning at least two important witnesses—Charles Cook and Robert Farr. In support of his request for evidentiary hearing, Petitioner presents the Court with the affidavits of Mr. Cook and Mr. Farr. A review of the trial record in this case reveals that the testimony of Cook and Farr was critical to the state's case in chief at the guilt stage of his trial. The affidavits of Cook and Farr indicate that they have only very recently been willing to discuss this case with Petitioner or his attorneys. Petitioner asserts and offers proof that he could not have had the information regarding this issue prior to any of his three state evidentiary hearings. Petitioner sought the aid of the state court to develop these facts in October 1992, when he asked the state court for

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[1] The Court notes that Petitioner enjoyed three state evidentiary hearings over a thirteen year period. *Ex parte Banks*, Application No. 13,569 (evidentiary hearing held January 2, 1984); *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989)(evidenitary hearing held May 15, 1984); and *Ex parte Banks*, Application No. 13,569 (evidentiary hearing held March 29-April 1, 1993 and July 22, 1993).

investigative assistance regarding Cook's testimony. The Respondent objected to this request and stated that the state had made no deals with Cook for his testimony. The state court never acted on Petitioner's request for assistance. Consequently, no evidence was presented on this claim at the third state evidentiary hearing. The state court in its findings of fact and conclusions of law stated that "there was no agreement between the State and the witness Charles Cook." *Ex parte Banks*, Application No. 13,568-03 (third state application), Transcript Vol. V, 167-168. The state court makes no other mention of this issue, and no specific finding that the state did not suppress exculpatory evidence.

A federal habeas court is bound by a state habeas court's finding of fact that there had been no suppression of exculpatory evidence. *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998). In *Little* the district court had before it a specific factual finding, by the state court, that there was no suppression of exculpatory evidence. *Id.* The same is not true in this instance. Here the state habeas court made no specific findings of fact on this issue. Further, Petitioner has demonstrated that he did not have a full and fair opportunity to present his evidence on this issue to the state court, primarily because the witnesses did not come forward until after the state court evidentiary hearings. Petitioner should be granted leave to develop the factual basis for his *Brady* claim.

2. *Ineffective Assistance of Counsel*: Petitioner asserts that he should be allowed an opportunity to further develop the record underlying his claim of ineffective assistance of counsel. Petitioner's ineffective counsel claims encompass some eleven (11) trial errors. Petitioner also claims one (1) error by appellate counsel that rendered his assistance to Petitioner ineffective.

In this case the state habeas court made no specific findings of fact regarding Petitioner's claims of ineffective assistance of counsel. The state court held that "counsel for Applicant at

trial did give the Applicant effective assistance of counsel throughout all stages of the trial proceedings, including voir dire and pre-trial." *Ex parte Banks*, Application No. 13,568-03 (third state application), Transcript Vol. V, 169. The state court also concluded that "as a matter of law [Petitioner] received effective assistance of counsel at all stages" of the trial. *Id.* at 173.

"There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant. As such, when the state court did not resolve a fact issue that would entitle the petitioner to relief if resolved in his favor, the petitioner is entitled to an evidentiary hearing on the issue." *Goodwin*, 132 F.3d at 183. In determining whether the state court reached the merits of a factual issue, the district court may, in appropriate circumstances, imply fact-findings from the state court's disposition of a federal claim that turns on the factual issue. *Id.* (citations omitted). In *Townsend v. Sain*, 372 U.S. 293, 314 (1963), the Supreme Court observed: "If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia."

Petitioner raises some twelve instances of lack of effective assistance of counsel. In this case, neither the state district court nor the Texas Court of Criminal Appeals made any express findings of fact regarding whether Petitioner received effective assistance of counsel at trial and on direct appeal. Furthermore, it is not clear that either court made any implicit fact-findings on these issues. In addressing Petitioner's habeas petition, the state courts made no finding of fact or conclusion of law regarding any of Petitioner's specific allegations of ineffective counsel. Rather, the state district court recommended, in a two-paragraph passage containing

no legal analysis of the claims, that Petitioner's request for relief be denied. The Texas Court of Criminal Appeals accepted the recommendation in an even more summary fashion. A conclusion that the state courts' summary denial of the instant petition for habeas corpus relief implies a finding that Petitioner received effective assistance of counsel finds no support in the Supreme Court's jurisprudence and is contrary to this circuit's treatment of implied fact-findings. Petitioner should be allowed to develop the record on his ineffective assistance of counsel claims.

3. *Swain claim*: Lastly Petitioner asserts that he should be allowed to present evidence of the systematic exclusion of African-Americans from jury service on felony trials in Bowie County, Texas. Petitioner raised this claim in state court and requested expert assistance from the state court to allow proper development of the claim. The state court denied Petitioner's request for expert and investigative assistance, but did allow him to put on testimony of various witnesses, including a statistical expert. Petitioner claims that the state court denied him a full and fair opportunity to present evidence by denying his requests for assistance. Petitioner seeks to submit affidavits from Dr. Kent Tedin, the statistician who testified at the third state habeas hearing, and from a paralegal who gathered statistics regarding the races of specific veniremen excluded from Bowie County, Texas juries during the relevant time frame.

Rule 7(b) of the Rules Governing Section 2254 Cases allows the Court to order the parties to expand the record including the filing of affidavits. In this case the Court notes that the state habeas court did make a finding that "the statistical data, standing alone, presents a pattern, of exclusion of black veniremen." The state habeas court also found that certain facts eroded the reliability of the statistical data, including lack of certain types of information about prospective veniremen. Petitioner, avers that he now

possesses the missing statistical information, and that he was prevented from presenting this evidence in the state proceeding by the actions of the trial court.

The Court finds that expansion of the record in regards to the *Swain* claim is appropriate in this instance.

IT IS THEREFORE ORDERED that the Petitioner be allowed to proceed with presentation of additional evidence regarding the following issues:

1. Whether Petitioner's Fourteenth Amendment rights were violated by the state witholding exculpatory tending to show Petitioner's innocence.

2. Whether Petitioner's Fourteenth Amendment rights were violated by the state witholding impeachment evidence concerning two of the state's essential witnesses, Charles Cook and Robert Farr.

3. Whether Petitioner was afforded effective assistance of counsel in the following particulars:

a. Whether trial counsel conducted an adequate pretrial investigation, for either the guilt phase or the punishment phase of the trial.

b. Whether trial counsel effectively cross-examined the state's witnesses.

c. Whether trial counsel was ineffective in failing to call all the mitigation witnesses who were prepared to testify on behalf of Petitioner.

d. Whether trial counsel was ineffective for failing to have Petitioner examined by a mental health expert and for failing to seek such expert assistance.

IT IS FURTHER ORDERED that Petitioner's presentation of evidence, at the Evidentiary Hearing scheduled for June 7 and 8, 1999, be limited to the foregoing issues.

IT IS FURTHER ORDERED, that Petitioner expand the record in this matter pursuant to Rule 7 of the Rules Governing Section 2254 Cases, by filing with the Court the affidavits of Dr. Kent Tedin and Ms. Helen Beardsley, regarding the *Swain* claim urged by Petitioner. This expansion of the record shall occur in accord with the Court's Scheduling Order. Pursuant to Rule 7(c), Petitioner will submit copies of the affidavits to the Respondent at the time he files same with the Court. Respondent shall have the right thereafter to admit or deny the correctness of the affidavits as provided by Rule 7(c) and the Court's Scheduling Order.

SIGNED this 4th day of March, 1999.

/s/ Caroline Malone
CAROLINE MALONE
UNITED STATES
MAGISTRATE JUDGE

Federal Evidentiary Hearing (Excerpt)

* * * *

Q Can we turn now to the litigation investigation in this case. And let me ask you first of all, what accounts for why some people grow up and seem to lead productive lives and others don't?

A That's a, I think, fundamental question as we look at individuals who suffer abuse and trauma in their childhood and then do not go on to commit acts of significant violence. The best analogy I think is not unlike children growing up on top of a toxic waste dump. All the children don't get cancer who grow up on top of the toxic waste dump, but you have disproportion incidents of cancer among those kids. Maybe it's 1 in 10 of those children, but in the surrounding community it's 1 in 500. So you simply have a dramatically increase morbidity from that group. And a similar thing happens in response to toxic childhood experiences, as best we can understand it as we look at differences and outcome, it's a function of trauma. And Mr. Banks had significant trauma that he was exposed to. Pre-exposing and contextual factors. For example, the degree of violence and conflict that's happening in his home and also the skin disease that he had. That then interfered with one of the primary protective factors that might have otherwise occurred, because he had this skin disease and the asthma, he then was not in close association with peers or athletics or other activities that would have given him some substitute mentoring and protection. And also as a function to intellectual problems and learning disabilities, school was also not a sanctuary for him.

Q It's important to explore when you are preparing for a capital case life history of an individual?

A Yes, it is. That's fundamentally important.

Q Why is that?

A Well, the family history and the life history of this individual is kind of a road map. As we look at that from the generational point of view, we see influences that track from

generation to generation to generation. And that gives us some sense of the family script and history within this family system. Though there's a function of the effects of heredity as well as behavioral shaping of a child. And these account for a general maxim that childhood is formative. A child is a father of a man. That's why we are so concerned about our children not having traumatic and major adverse life experiences, because we all know that's when the concrete and the shape of it is being formed. Later in life the traumas put dents in it, but they don't affect the basic structure the way the childhood does.

Q Are there some core principles here?

A Yes, there are. There is a fundamental principle that has been recognized in psychology for decades and that's that the quality of attachment to parents and other members of your family during childhood is central to how the child ends up relating to and valuing other members in society as an adult. That's bedrock. The various schools of thought in psychology don't argue with this basic notion.

Q What about early childhood development?

A Well, we can use an analogy of a house being constructed to think about how you go about creating a healthy human being. This is not—this notion of life being like a house being constructed is not original to me. Jesus used a similar analogy in his parables and other folks have since that time. We could think of early childhood as being like laying the foundation of a house and that's based on secure stable relationships with parents.

Q Once the child is older?

A In middle childhood, it's like the framework of a house is going up. And here the fundamental experience is that there is continued security and stability and supportive parental involvement and expanding competencies, which is a fancy way of saying you're getting the kid out there in music lessons and little league and gymnastics. You're helping them be more independent and successful and separate creatures

here in the world and you're clapping for them. You're out supporting that.

Q Later on?

A In adolescence you need positive same sex role models. And the parents are gradually turning loose and letting the child have more freedom. And then the kid screws up and you clamp back down, and then you start to relax again. The parents are kind of titrating how much support and structure the child requires. And then in late adolescence and early adulthood what's required is having intact capabilities and available opportunities and then having adults that are there to help mentor and assist and guide you and kind of get you launched into adulthood yourself. And this sequence of events is how you get the most functional, the most healthy human beings. It's how you construct the strongest house.

Q In your evaluation in this case, Doctor, did you identify any factors that can harm or inhibit healthy development?

A Yes, I did.

Q What did you find?

A I identified a number of emotional damaging factors in the history of Delma Banks. First, there is multi-generational family distress. The alcoholism of his father, the physical and emotional abuse by his father, observed domestic violence, his mother's dependent victimization and her failure to protect him and the other children, his learning disability and associated school failure, a chronic skin rash and bronchial asthma, and isolation from his peers.

Q What did you find with regard to family distress? Are they generational?

A His father's father, his paternal grandfather, was an alcoholic, he was violent and abusive to his own wife and kids, he chased his wife up a tree where she remained for hours. And this happened on more than one occasion that he would be violently intoxicated. And then Delma's father was

alcoholic, violent and abusive to his wife and kids, also chased his wife out of the house.

Q What are the effects of this alcoholism?

A The adverse effects of parental alcoholism on a child are many and broad. First, there is a genetic increased susceptibility to substance abuse. There is modeling of inappropriate and irresponsible use of alcohol. The psychological injuries that the child sustains involve damage attachment or bonding to the parents. The likelihood of there being neglect by one or both parents that is associated with the intoxication dramatically increase risk of physical and emotional abuse. A home setting and environment that is inconsistent and unpredictable. Exactly the opposite of what a child requires. Children are very egocentric. That means that if the world around them is out of control, they don't think there's something wrong with the adults around them, they think they're incompetent. Or if they're not loved very well, the child doesn't think there's something wrong with daddy, the child says there's something wrong with me, I'm unlovable. So they internalize and apply it in a very egocentric way. Their demands for premature responsibility for the child to act more like an adult in the family, essentially, it results in a loss in childhood and the normal development sequences that we would expect to see there. It's a broad social and psychological risk factor for relationship problems, self-control, and behavior disorders, feelings of defectiveness, psychological disorders, and criminal behavior. It's a very broad base in risk factors.

Q What about domestic violence?

A Mr. Banks observed his father yelling and cussing at Ellean, his mother, and other children in the family. His father making jealous accusations of Ellean. Just Delma Banks, Sr., would demand that Ellane cook for him when he would come in in the early morning hours and be drunk and then throw the food on the floor. He repeatedly threatened to

harm her and the children. He discharged fire arms in the house. It was described to me that there were more bullet holes in the house than windows and doors. He slapped and backhanded Ellean. She would flee with the kids if she could and take refuge with neighbors or family or hide under a bridge. At other times, she simply fled and was not able to take the kids with her and they would then be left with Mr. Banks, Sr., who would be in a drunken rage.

Q What's the effect of this on children growing up in a home?

A The effects of observed domestic violence are quite destructive. There are models of aggression that are displayed to the child who is experiencing a pretty pervasive climate of confusion and terror that results in pervasive insecurity and anxiety. The child feels feelings of guilt that he's not able to fix this as well as feelings of helplessness. There is profoundly damaged attachment to the abuser. Ambivalence toward mama, toward the victim for not doing something, for not removing herself, or better protecting the children, and yet feeling sorry for her and wanting to protect her. A significant amount of anger that you come out of this. In summary, observing chronic domestic violence is considered to be as psychologically damaging on the child as being directly physically abused themself.

Q Did you find evidence of physical abuse?

A Yes, I did.

Q What did you find?

A It was a climate of physical abuse and emotional terrorization that was directed toward Delma Banks by his father. His father yelled and cussed at him. When he was a little baby, threatening to knock his teeth out with a frying pan when he was fussy when he was teething. He held Delma Banks and his siblings at gun point. Threatened to sic the dogs on the kids. There's an instance where the children took refuge on top of the couch, because the dogs were very aggressively coming after them. And they stayed awake

through the night up on top of the couch. Delma Banks, Jr., was beaten with a belt, strap, horse whip, extension cord, coat hanger. After one of these beatings, he was tied to a tree by his father and then left with statements of how the wild animals were going to find him and begin to chew on him during the night.

Q How does this affect children?

A As you would anticipate, the impact of this is broad and horrific. There is damaged attachment in many ways, the recurrent confusion the child experiences, constant terror and fearfulness, damaged capacity and skills to relate to others, because the family remember is the place where these primary skills develop, where you learn what it means to care about others and relate to them. There's a development of an identity of being incompetent and unlovable. Broad risk per se. Wide variety of psychological disorders, much increased risk of neurophysiological problems and intellectual deficits, marked increase risk for behavior problems in childhood, as well as violent and criminal behavior in adolescence and adults. And again a wide literature was available across the 1970's regarding this.

Q Have you made any findings with regard to Mrs. Banks or the effect of Mrs. Banks on this?

A Yes, I did.

Q What was that?

A Mrs. Banks remained in a relationship where she and the children were violently victimized. Repeatedly she would leave and separate only to reconcile and come back into the marriage. She tried to keep the children quite and in their rooms and restrict their activities and keep friends from coming over to avoid setting off Delma Banks, Sr. And on many occasions she fled the house leaving the children behind with Delma Banks, Sr., who was drunk and raging. So out of her own fears of independence and perhaps practical economic factors as well, she remained victimized herself and failed to protect the kids.

Q Did you find evidence of—with regards to Mr. Banks, Jr., regarding learning disability?

A Yes, I did.

Q What did you find?

A There are indications of his having difficulty learning in school. His reading capability remained low until his prison confinement and still somewhat marginal. His school performance was poor. He was held back a year in elementary school and subsequently is described as being socially promoted. His verbal IQ score is of a borderline intellectual capability straddling the edge of mental retardation to borderline to below average. There is a significant discrepancy between his verbal and performance IQ scores. And there are deficits that are displayed in the neuropsych assessments and communication, task shift and planning, process and knowledge situations, and short term memory.

Q Did you find any deficits in verbal?

A Yes, I did. And this depicts the various testings that have been done on his verbal IQ score. These occurred between 1992 and 1996. And they cluster, if we look at this as a—the distribution of intelligence or IQ scores in the community where the middle IQ score is 100, that means 50 percent of the population have a IQ score of greater than 100 and 50 percent have an IQ score of less. We look at the various scores that he's obtained across this—these repeated examinations. An IQ—verbal IQ score of 75 which corresponds with the 5th percentile, verbal IQ score of 80 that corresponds to the 9th percentile, and a verbal IQ score of 82 that corresponds with the 12th percentile. Now IQ scores are not an exact measurement. It's kind of like getting on a scale. You step on it one time it says your weight is 150 and you get off of it, you step right back on it says 147, you get right back off of it you get it says 153. There's a certain error range called a standard error of measurement and so we can say with a 95 percent degree of certainty that if we attach plus or

minus five points to each of these—. So this range across here, is where his IQ score—verbal IQ score abilities are likely to fall and his straddles the mental retardation range comes right at the edge of it. This is the mental retardation range below 70 this mark with the yellow bar. It straddles the mental retardation range, the borderline range, and the below average range.

Q Well, how does a learning disability impact on school success or failure?

A Well, certainly, to have a learning disability almost by definition results in school your school experience being one of failure and low achievement. With—it can be mediated some by special education and intervention. But it's broader than simply failing in school. As the child goes to school, he is aware that his performance is deficient and school's a place of frustration and disappointment. Now this is particularly critical for a child that has multiple other risk factors, whose home is chaotic and violent, and whose body is out of control with a skin disorder. If you can go to school and be successful, there then there is a island in your life that provides some sanctuary. But if you're learning disabled or have intellectual problems, then that's not there for you either. The child is aware of being different, has reduced self esteem. There's little sense of safety or refuge at school. Since the system really doesn't have a place for you, this kind of natural order of society that's experienced of childhood, marked risk of dropping out of school, increased susceptibility of influence in terms of being an adolescent who's out of school, reduced employment capability and opportunity. And again this is a broad social risk factor for all kinds of adverse outcomes. We can see an illustration of that if we look at the educational levels of individuals who are in prison. This was a large scale prison survey that was performed in 1974, published in 1979. And what we see is is that at that time 32 percent of state prison inmates had an education of 8th grade or less. The highest grade they obtained was 8th. That over 70

percent had a less than a high school graduation. And this is a very practical demonstration of the impacts of learning disabilities and school failure as reflected in educational levels of folks ending up in prison.

Q Did you find any evidence of Mr. Banks having skin problems or other problems?

A Yes, I did.

Q What did you find?

A Both the medical records that I reviewed prior to 1980, as well as his TDC records after 1980, give evidence of a chronic skin disease. He broke out in a rash covering his body within weeks after birth. As an infant his mom tied socks to his hands and then tied his hands together to keep him from scratching himself. And still he would rub his face raw on a pillow. He was doctored with home remedies because they couldn't afford medical attention on many occasions. This is not a subtle rash. We're talking about weeping, oozing, bleeding lesions and sores and cracks in the skins. Even in TDC, there is some description about there being these weeping skin abrasions and sores. The condition worsened so they sought medical attention. He was given penicillin and then nearly died of an allergic reaction and it also much aggravated this dermatitis condition. He was discovered to be allergic to beans, eggs, fish, and poultry. His dad was working in a poultry plant, so his dad simply coming in the house would set off a reaction. As well as the problem that a family that's already economically and psychologically stressed has to prepare a special diet for a child. His skin hurt much of the time. His activities—physical activities were restricted, because movement would open the scabs that tend to occur at the folds of his elbows and knees. He was extremely self-conscious and so wore long sleeve shirts and pants. He was ridiculed by peers who responded to these open, oozing sores with teasing and disgust. He was subject to severe asthma attacks. And then faced multiple adverse outcomes that are a part of these including chronic pain, a

sense of being different and defective, withdrawing from normal activities, eroded opportunities for competence and independence, because he's not out there with his peers or involved in the athletic activities. So then he ends up being isolated and rejected by them.

Q Now what are the further consequences of these kinds of health problems?

A Well, if you look at the literature that was available in 1978 regarding the impact of a chronic health condition on child development, you see eight basic emotional needs that children have that are impeded or blocked by chronic health conditions. And those include love and affection, security, acceptance as an individual, self respect, achievement, recognition, independence, and authority and discipline. Instead of these needs being met, here are the experiences of a child with chronic illness. And again many of these are reflective of Delma Banks' experience in childhood. Feelings of weakness, as his body was failing him and he couldn't do what other kids would do. Feelings of being different, fear of the unknown in terms of when an asthma attack was going to occur again or when his skin was going to erupt further. Fear of the pain of tearing open the scabs as well as exacerbating the condition. Blocked achievement. Dependence because he is not able to be out there in—out there with the other kids where you develop and experience independent competence. Altered discipline of two sorts. First, they may be—your family may be easier on you out of sympathy and give you some special waivers of expectations. At the same time, when you're in an abusive family the way Delma Banks was; you may be targeted more because you're a source of additional frustration in the family. Feelings of rejection both within the home as well as among his peers. Lack of acceptance, hostility, lack of affection, restricted activities, relationship restrictions, and also what you picture for your future. Are you going to have a girlfriend, are you going to have a wife, are you going to have a family, and what's your future health

experience hold for you?

Q What's the impact of fear, isolation, and rejection?

A Well just—if we look at just one of those factors which is that the derma—this chronic skin condition isolated him from his peers, peer isolation and rejection is its own very significant broad social risk factor for adverse outcomes. And all kinds of things that are associated with it. Not only the emotional experience of loneliness and feelings of defectiveness, but because you're not participating with the other kids and are not in their households and don't have the mentoring of coaches and indian guides and scout leaders and that sort of thing. All kinds of opportunities for the development of competence and social skills and having substitute adult mentors to replace your own family or parents who may be deficient, you're deprived of alterative models about how you go about relating to others in a healthy fashion. So this single outcome of the chronic skin condition is a very significant one that fundamentally alters—that can fundamentally alter the course of development.

Q Given all these findings, how did these factors affect Mr. Banks' development?

A Well, if we go back to our analogy of a house under construction, the foundation is disturbed at the outset from his chronic skin condition, his father's drunken rages, the chaotic nature of the household, the marital separations, the stability and security and safety of attachment that allows you to make a strong foundation where lacking. In middle childhood, the chronic skin disease continues and he's learning disabled and a school failure and is subjected to peer ridicule and rejection and isolation. Continuing in middle childhood there is his father's alcoholism, the physical and emotional abuse that he's subjected to in observing domestic violence in the home. The framework here is having a hard time getting constructed. It's being knocked down even as it's being built. In adolescence, continuing chronic skin disease and a violent and chaotic household with peer rejection, isolation, and

failure in school. And continuing in late adolescence, continued chronic skin disease, continued violence in the home, continued peer isolation and rejection, continued school failure, and dropping out of school. And as we look at Delma Banks at the time of these events, developmentally he is still in a late adolescent phase at that time.

Q Given all of this and your human studies, what would your opinion be of how Mr. Banks, if he had been sentenced to life, adjusted in the Texas prison system?

A The prison system provides a significant degree of external structure to help insulate and support the damages that have occurred to somebody up to that time. In fact, a history of having—of having much damage having been done—to somebody emotionally across the childhood, the presence of learning disability and school failure, many of these risk factors are quite commonly observed in a prison population. And are particularly commonly observed in capital offenders. So those factors don't alter the base rates. We've already accounted for those. Because in our base rates following first degree murderers and prison inmates and long term inmates, those individuals often have histories that are similar to his and so what happens then is in the frame work of prison with work and confinement and structure and treatment and staff, it helps block and insulate much of the adverse expressions and damage that might have otherwise been done. And by the time they're paroled many years later in middle adulthood, then their risk in the community as we observed in those other statistics is relatively low.

Q Thank you, Doctor.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.,
Petitioner,

vs.

GARY JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

PETITIONER'S POST-HEARING BRIEF

In a post-hearing order, the Court directed briefing on four matters. Three concern the same evidentiary issue: whether *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992), requires the testimony Mr. Banks presented from three former state witnesses be stricken because it was not presented in prior state proceedings. The fourth concerns a legal question: whether the prosecutors' repeated vouching for the credibility of their key witnesses amounts to prosecutorial misconduct. In this submission, Mr. Banks addresses the *Keeney* issue. As he will soon be filing proposed findings of facts and conclusions of law that will address comprehensively the prosecutorial misconduct issues raised by this case, he will address the vouching question in that pleading.

We state our conclusion first. Last year, the Court ordered an evidentiary hearing on two issues: (1) due process claims flowing from the state's suppression of exculpatory and impeaching evidence concerning its two key witnesses,

Charles Cook and Robert Farr, and (2) trial counsel's ineffectiveness. The court also announced that it would allow limited supplemental evidence on the jury discrimination claim. It did so only after reviewing the entire record, Mr. Banks' assertions, advanced in several pleading, that further factual development of these issues was warranted, and the Director's opposition which relied, *inter alia*, on the *Keeney* rule. Because there was no actual hearing on the due process and ineffectiveness issues and both received only summary treatment in state proceedings, the Court properly concluded that *Townsend v. Sain*, 373 U.S. 293 (1963), as modified in part by *Keeney*, allowed for further factual development on these issue. This judgment was correct at the time it was made.

Subsequent events only confirm the correctness of that judgment. Court ordered discovery dislodged from the prosecutors' files a lengthy pretrial statement law enforcement officials extracted from Mr. Cook that had not been previously disclosed to Mr. Banks. It contains a wealth of impeaching information and supports Mr. Cook's hearing testimony that his key trial testimony was coached and inaccurate. This important document was suppressed at trial and throughout later state court proceedings. Moreover, despite Robert Farr's flat denial at trial that he was an informant, which trial prosecutors assured jurors was truthful, the record now establishes beyond doubt that he served as a paid informant in this case, that much of his testimony was misleading and untruthful, and that he was unavailable and unwilling to reveal this important information to Mr. Banks until after all state court proceedings. Moreover, despite Robert Farr's flat denial at trial that he was an informant, which trial prosecutors assured jurors was truthful, the record now establishes beyond doubt that he served as a paid informant in this case, that much of his testimony was misleading and untruthful, and that he was unavailable and

unwilling to reveal this important information to Mr. Banks until after all state proceedings had concluded.

Thus, it is not a close question as to whether the Court was correct in ordering the evidentiary hearing in the first place. A hearing was plainly warranted. And given what the record now shows, Mr. Banks cannot imagine any construction of *Keeney* that would require the Court to strike the testimony of any witness who appeared and testified at the June hearing.

1. *Robert Farr's testimony should not be stricken.* A brief review of the history of this due process claim suffices to show that Mr. Farr's testimony was properly received.

James Elliott, one of the trial prosecutors, acknowledged in his testimony before the Court that the Due Process Clause of the Fourteenth Amendment requires the prosecution to disclose exculpatory and impeaching material to the defense prior to trial. FH Tr. 25. If the prosecution utilizes an informant, pays the individual for services rendered, and calls him as a witness, due process requires that this information be disclosed to the defense. Indeed, in this case, the prosecution assured the defense that it understood these obligations, and would voluntarily, without the need for litigation, turn over any such material in advance of trial.[1] Thus, prior to trial, the prosecution understood its straightforward duty to reveal Farr's identity as an informant as well as disclose the fact that he had been paid for his services in this case. Yet even though it had assured the defense it would reveal just this type of information in advance of trial it did not do so.

During trial, Mr. Farr testified at both the guilt and penalty phases of trial. On neither occasion, did Farr volunteer that he was a paid informant. 10 R 2503-08. Indeed, during his penalty phase testimony, he denied that he was an informant.

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[1] In a letter to counsel dated July 7,1980, then assistant district attorney Charles Attaway advised counsel: "we will, without necessity of motions provide you with all discovery to which you are entitled." 1 R 13.

With this affirmative misrepresentation, the prosecutors were obligated to inform the court, defense and jury of Mr. Farr's true status—that indeed he had acted at a paid informant in this case.[2] They remained silent. And to assure any juror who might have a lingering doubt about whether or not Mr. Farr might be an informant, Mr. Rafaelli pointedly charged jurors that Robert Farr "has been open and honest with you in every way." *Id.*, at 2579.

Thus, the record shows that while Mr. Rafaelli and Mr. Elliott knew that Mr. Farr had served as an informant and had been paid for services rendered, they (1) withheld that information from the defense prior to and during trial, (2) allowed Mr. Farr to falsely deny this status before the jury, (3) failed to correct that false testimony, and (4) affirmatively and unambiguously assured the jury that this denial was the complete truth.

It is not surprising then that Mr. Banks and his counsel did not spend time or energy thereafter attempting to demonstrate that Mr. Farr was a paid informant. Suspicions did not arise until January, 1992, when Mr. Banks finally succeeded in locating and speaking to the state's other key witness, Charles Cook, who for the first time revealed that he had testified pursuant to a deal and that some of his testimony was not accurate. Mr. Banks alleged in his state habeas petition, upon information and belief, that Mr. Farr had acted as an informant and that some of his trial testimony was not truthful. *See* Petition for Writ of Habeas Corpus in *Ex Parte Banks* No. 13568, filed January 13, 1992, para. 114, p. 62. He further requested that the court provide funds for an investigator to pursue these and other claims. In its answer, the state never disputed this allegation specifically. While Mr. Elliott, the author of the answer, filed an affidavit summarily denying that Mr. Cook had testified pursuant to a deal, he did

[2] *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

not address Mr. Farr's status.[3] Because Mr. Farr could not be located, Mr. Banks was unable to offer any affirmative evidence to support this allegation. In denying the petition, the state court made no finding of fact or legal determination concerning the due process claim that related to Mr. Farr.

It was not until October, 1996—nine month *after* state remedies were exhausted—that Mr. Banks finally located Mr. Farr in southern California. Only then did he reluctantly provide an affidavit in which he disclosed for the first time that he had served as a paid informant in this case, and that much of his testimony was misleading and untrue. In the declaration that Mr. Banks introduced at the June hearing before this Court, FH Tr. 16, Mr. Farr explained that he was afraid of revealing his informant status, that he would not return to Texarkana because of fear to his safety, and that he would not have disclosed his informant status to Mr. Banks prior to October, 1996.[4]

Given this scenario, the Director cannot now assert in good faith that it was Mr. Banks' fault that Mr. Farr's informant status was not litigated before the state court. Mr. Banks' repeated attempts at trial to uncover and present this evidence to the jury was met either by suppression or outright misleading statements. Where the prosecution assures defense counsel that it will voluntarily disclose that which the due process clause requires it to disclose, "defense counsel may reasonably rely" on those representations. *Strickler v. Greene*, 144 L.Ed.2d 286, 303, n.23 (1999). When he sought to litigate this claim in state habeas corpus proceedings, Mr.

[3] It is now clear why Mr. Elliott made no specific reference to Mr. Farr in his answer. A truthful response would have confirmed the merit of Mr. Banks' claim.

[4] The director did not object to the introduction of this declaration or contest the assertions made by Mr. Farr, except to preserve it *Keeney*-based objection to its admission. All the evidence at the hearing that relates to Mr. Farr's declaration account is consistent with its substance.

Elliott generally denied the allegation, (which he had to know was not an accurate response), and the state court held no hearing, made no findings, and did not rule on the claim. And Mr. Farr would not voluntarily disclose this information until after state remedies were exhausted. *See Strickler*, 144 L.Ed.2d at 304, n.27 (evidence is unavailable where state witness is unwilling to speak to defense). Mr. Banks would be hard-pressed to find a circumstance in which he would have a stronger argument that he was entitled to a federal hearing on this claim.

In former pleadings, Mr. Banks has demonstrated that *Townsend v. Sain* obligated this Court to hold a hearing on Mr. Bank's due process claims, given the absence of full and fair review in the state courts. The Court's recent decision in *Strickler v. Greene* confirms this view. The Court would commit plain error if, on this record, it followed the advice of the Director and struck Mr. Farr's testimony.

2. *Ms. Cook and Mr. Jefferson's testimony should not be stricken as well.* Similarly, any argument that Carol Cook or Vetrano Jefferson's hearing testimony must be stricken is wanting as well. Ms. Cook's testimony does not constitute a free-standing due process claim but provides important corroborating evidence concerning Mr. Banks' due process claim that relates to her brother, Charles Cook. Mr. Banks claims that the state violated fundamental due process norms by failing to reveal at trial (1) impeaching information in its possession concerning Mr. Cook, and (2) the fact that Cook's fate on a then pending Dallas arson charge was largely tied to the prosecutors' evaluation of his testimony against Mr. Banks. The state court held no hearing on this claim, and only summarily concluded, on the basis of the summary and incomplete affidavits submitted by Mr. Elliott and Deputy Sheriff Willie Huff, that Mr. Cook had no deal for his testimony.

The Court now possesses a great deal of evidence relevant to this claim that was not before the state court. It shows that despite repeated efforts, Mr. Banks was unable to place Mr. Cook's testimony before the state court due to no fault of his own, and the state court refused to hold an evidentiary hearing at which Mr. Banks could have required Mr. Cook's presence. As with Mr. Farr, Mr. Cook relented and finally agreed to speak to Mr. Banks representatives only long after state proceedings had concluded. Thus, it was not Mr. Banks' fault that Mr. Cooks' testimony, and all of the corroborating evidence now before the Court, was not presented in state proceedings. *Strickler*, 144 L.Ed.2d at 304, n. 23.

Further, we now know that the state suppressed at trial, and withheld from all subsequent state proceedings, a long recorded statement Mr. Cook made to authorities days prior to trial that contains a wealth of impeachment material, as well as corroboration of Mr. Cook's present testimony that his trial testimony was coached, much of it is not true, and that his overriding motivation to testify against Mr. Banks was to secure dismissal of the pending Dallas arson charge and habitual offender papers. *See Respondent's Exhibit #1*, FH Tr. 58. Ms. Cook's testimony corroborates Mr. Cook's present account. She testified that, like her brother, she was urged to give false testimony, *id.*, 125-27, that law enforcement officials told her that her brother would spend a very long time in prison unless he testified against Mr. Banks, *id.*, 123, 126, that those officials plied Mr. Cook with conjugal visits prior to and during his trial testimony, *id.*, 124-25, and that while she had tried prior to Mr. Banks' trial to have the arson charge dismissed, *id.*, 121, she had no success, and took no action to see that that charge was dismissed after Mr. Banks' trial, *id.*, 128.

Because her testimony corroborates Mr. Cook's in several important respects, and because Mr. Banks' due process claim concerning Mr. Cook warranted a hearing just as the

one concerning Mr. Farr, the Director can show no basis to strike her testimony.

Finally, Mr. Vetrano Jefferson's testimony is relevant to the Sixth Amendment ineffective assistance of counsel claim. A hearing in this Court was necessary because no hearing was held in the state court and the state court made no factual findings on evidence that was proffered before it. Where the state court fails to provide a full and fair hearing on a claim, upon demand, a federal court must hold a hearing and the petitioner is free to offer relevant evidence in support thereof. *Townsend v. Sain*. This testimony should not be stricken.

CONCLUSION

For the reasons stated herein, Mr. Banks respectfully requests that the Court not stricken from the record the testimony of Robert Farr, Carol Cook and Vetrano Jefferson.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed Mar. 7, 2000]

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

PETITIONER'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

INTRODUCTION

When the Congress of the United States amended the *habeas corpus* statute in 1867 to allow citizens incarcerated by state process to secure a review of the lawfulness of their imprisonment by the life-tenured federal judiciary, it surely had cases like this in mind.

This capital proceeding presents a rich factual record that demonstrates without question that the adversarial process failed to deliver a fair and just result in this case. It malfunctioned for a number of reasons:

- The trial prosecutors, sworn to uphold the law, repeatedly violated it to bring about Mr. Banks' capital conviction and death sentence. The record conclusively demonstrates repeated violations of core due process protections that significantly affected the verdicts at each stage;

* * * *

As District Attorney Raffaelli would later candidly tell the jurors in his opening statement, "I think the testimony of Charles Cook is critical . . . " 9 R 2129.

Mr. Farr's testimony—that Mr. Banks initiated a subsequent trip to Dallas one week later with Farr and another common-law brother-in-law, Marcus Jefferson, so that Mr. Banks could retrieve his pistol from Mr. Cook and commit armed robberies and, if necessary, kill during those crimes—not only linked Mr. Banks with the murder weapon but was the linchpin of its case for the death penalty as, the state would argue, it demonstrated that Mr. Banks would likely grievously harm or kill again.

The prosecutors had good reason to wonder whether jurors would believe Cook. He was a drug user and twice-convicted felon and made little money from his modest city job. Jurors might find it hard to believe that he would simply abandon a car while selling far less valuable items from it. He was also facing another felony prosecution in Dallas for arson. Habitual offender papers filed in that case one month prior to Mr. Banks' trial meant, upon conviction, that he faced a very long prison sentence. Surely some jurors might seriously wonder whether Cook was testifying honestly, or whether he was shading the truth to please Bowie County authorities in the hope that they would prevail upon the Dallas authorities to dismiss this serious charge.

Moreover, prior to trial, Deputy Sheriff Huff and representatives of the District Attorneys' office interviewed Cook at length and rehearsed his testimony in anticipation of trial. As we will discuss in more detail below, on many contested points, Cook made statements that were wholly inconsistent with his April statement. Repeatedly, he was coached on how to respond to some expected cross-examination, and how to deflect other questions. These

sessions could not have encouraged prosecutors that their star witness would impress the jury.

Similarly, Farr possessed his own ticklish credibility shortcomings. He too had a drug habit. Indeed, he had used drugs and was in a stupor on the trip to Dallas that culminated in Mr. Banks' arrest. As with Cook, some jurors might wonder whether he was telling the truth or was falsely aiding the state to help himself. Moreover, prosecutors knew he was a professional informant, had provided important services in this case, and had been paid for those services. If jurors learned about that, some could easily conclude that Farr's testimony, from beginning to end, had been bought and paid for, and was plainly unworthy of belief.

These shortcomings presented prosecutors with several fateful choices. Given the importance of Cook and Farr to the state's case at each phase of trial, the law obligated them to disclose to the defense Mr. Farr's informant status as well as the fact that he was remunerated for his services. Additionally, given Cook's numerous recorded inconsistent statements, the law also required disclosure of both the April and September statements, as well as any arrangements with Cook and Dallas prosecutors about not dismissing the arson charge and habitual offender papers until after Mr. Banks' trial. But with disclosure came the clear peril that the jury would find the state's case too untrustworthy to support a capital murder conviction and sentence of death. For reasons known only to them, the prosecutors chose to breach their pretrial vow of full disclosure and to withhold all information about Mr. Farr, the September, 1980 Cook statement, and the arrangement that Mr. Cook's arson charge would be dismissed only if he performed "well" while on the stand. And for good measure, they also decided to forcefully and repeatedly assure jurors that these witnesses testified truthfully.

* * * *

In closing, the prosecution argued that the evidence showed clearly that Mr. Banks would be dangerous in the future and that it had easily proven the special issues. 10R at 2578-82. The defense argued briefly that this same evidence was insufficient. *Id.* at 2590-95. The jury found the state's evidence established the special issues and the judge imposed a sentence of death. *Id.* at 2598-2602.

f. State Post-Conviction Proceedings: New Evidence

Prior to filing the instant federal *habeas corpus* proceeding, Mr. Banks filed three state post-conviction petitions, as state law then plainly allowed him to do. In the first two proceedings, no evidence of consequence to this proceeding was presented. In the third proceeding, an evidentiary hearing was held on two claims involving the jury, and additional evidence was presented by affidavit with regard to two other claims: the due process/suppression of material evidence claim and the ineffective assistance of counsel claims. That evidence will be discussed *infra* in the body of the argument on those claims.

g. Federal Evidentiary Hearing Evidence

On June 7 & 8, 1999, the Court conducted an evidentiary hearing, limiting evidence to be received to the due process and counsel claims, and allowed two supplemental affidavits relevant to the *Swain v. Alabama*, 380 U.S. 202 (1965) claim.

i. Due Process Claim Evidence

Mr. Banks called the surviving trial prosecutor, James Elliott, the lead investigator, Willie Huff, and state witnesses Robert Farr (by declaration), Ida Marie Martin, Carol Cook, Charles Cook, Marcus Jefferson, and Vetrano Jefferson. Through these witnesses, he sought to establish the following claims that the Director had denied:

* The prosecution knowingly and purposefully suppressed at trial the facts that Robert Farr served as an

informant for the prosecution in this case and was paid for his services. These facts were not disclosed to the defense prior to, or during, trial and were discovered only after federal proceedings commenced. Because critical portions of Farr's trial testimony at each phase of trial were misleading and untrue, as was the jury argument made by prosecutors in relation thereto, this error alone warrants full relief.

* The prosecution knowingly and purposefully suppressed at trial material impeachment evidence concerning Charles Cook that took at least two forms: (1) a long, incomplete pretrial interview statement, (FH Pet. Ex. B-4), containing vast amounts of impeachment material was not disclosed at trial and was disclosed only after this Court, at Mr. Banks' request, directed production of such material; and (2) information about highly favorable treatment law enforcement officials extended to Cook in exchange for his "favorable" testimony against Banks, the principle benefits being that no charges would be brought against Cook relating to the alleged disposal of evidence and that a then-pending felony charge and related habitual offender papers in Dallas County would be dismissed.

1. Evidence Relevant to Mr. Farr's Informant Status and Credibility

Four witnesses gave testimony concerning this allegation: Mr. Farr, Mr. Elliott, Mr. Huff, and Mr. Marcus Jefferson.

Mr. Farr testified by declaration that he worked as an informant for various police agencies, including Texarkana law enforcement agencies, before, during, and after Mr. Banks was arrested and prosecuted. *See* FH Pet.Ex. B-1 at 1.[2]

[2] Mr. Farr resides in California. Prior to the hearing, Mr. Banks moved that he be permitted to depose Mr. Farr or submit his declaration in lieu of live testimony for two reasons: Mr. Farr did not want to return to Texarkana because he feared for his life, given his prior services as a police informant, and he is in poor health. The Director did not insist that Mr. Farr be produced for cross-examination, and limited his objection to Mr. Farr's testimony solely to *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), grounds. FH 13.

He was sometimes paid for these services. *Id.* Law enforcement in Texarkana and elsewhere knew of his use of illegal drugs and practice of falsifying prescriptions to procure drugs but never arrested him for these activities. *Id.* Farr testified that he became involved in this case after Deputy Sheriff Huff learned that Farr knew Banks and sought his assistance . . . .

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2. Evidence Relevant to The Existence of Non-Disclosed Impeachment Material Concerning Charles Cook

Pursuant to discovery ordered by the Court, the Bowie County District Attorney's office released portions of its file to Mr. Banks in advance of the hearing. Included in this disclosure was an undated, and apparently incomplete, transcript of a pretrial interview held between Charles Cook, Rodney McDaniel, and Charlie Leathers of the District Attorney's office, and Deputy Sheriff Huff. This interview was conducted shortly before trial. The transcript was offered and received into evidence. FH Pet. Ex B-4.

Mr. Elliott testified that this document was generated during interviews conducted shortly before trial. Mr. McDaniel, then an assistant district attorney, Mr. Leathers, and Mr. Huff were in attendance. Mr. Elliott examined handwritten notes on several pages of this exhibit and confirmed the writing was Mr. Raffaelli's and that Raffaelli possessed this transcript at trial. FH 45. Elliott conceded that he did not believe the transcript was turned over to the defense prior to or during trial. *Id.* at 45-47. The trial record

indicates that only Mr. Cook's April, 24, 1980 statement to police was disclosed to Mr. Cooksey at the conclusion of Cook's direct testimony. 9R 2312. Indeed, Mr. Elliott testified that he decided to disclose Ex. B-4 to Mr. Banks in these proceedings only to make sure that he complied with this Court's discovery order. FH at 69.

In his testimony before this Court, Mr. Cook confirmed that he spoke with law enforcement extensively about his testimony prior to trial. FH 135. He also said that much of his trial testimony was rehearsed and certain key portions were not truthful. *Id.* at 137-38, 144-46.

Findings of the Court

The Court concludes that Exhibit B-4 was in the possession of the prosecution at the time of trial and that it was not disclosed to defense counsel at any time prior to or during trial. The Court finds that this document was first disclosed to Mr. Banks in the Spring of 1999 as a result of discovery ordered by this Court. The Court also concludes that this document contains numerous statements made by Mr. Cook that are not consistent with his trial testimony, and that it contains passages where law enforcement officials coach him on how to present his testimony before the jury.

3. Evidence Relevant to Deal for Mr. Cook's Testimony

Several witnesses provided testimony that is relevant to this matter.

Mr. Elliott testified that he did not arrange a deal between his office and the Dallas County District Attorney's office concerning the arson charge that was pending against Mr. Cook at the time of Mr. Banks' trial. FH 52. He testified that Mr. Cook was Mr. Raffaelli's witness, and thus it was possible, but unlikely, that Mr. Raffaelli made a deal without his knowledge. *Id.* He testified that both Mr. Leathers and Mr. Huff had contact with Dallas authorities that he was not privy

to, but that Huff had no authority to strike any such deal. *Id.* at 54. He also testified that on the day after the trial concluded, he drove with Mr. Huff and Mr. Cook to Dallas, and spoke to the Dallas assistant district attorney who was assigned to Mr. Cook's arson case. *Id.* at 51-53 . He could not recall this prosecutor's name, but testified that he told this assistant district attorney that Mr. Cook had given helpful testimony for the prosecution in a capital murder case. *Id.*

Mr. Huff testified that he met with Mr. Cook in Dallas on three or four occasions prior to transporting him to Texarkana for trial, that he became familiar with the pending arson charge during the summer of 1980, and that he spoke to Cook about the charges. FH 80-82, 97-98.

* * * *

RESOLUTION OF LEGAL CLAIMS

I. PROSECUTORIAL MISCONDUCT [Claim J]

Mr. Banks alleges that systematic prosecutorial misconduct of the Bowie County District Attorney deprived Delma Banks of due process of law and compels a new trial. He charges a pattern of abuses perpetrated by the District Attorney that includes (1) the failure to disclose the status of Robert Farr, an important guilt-phase witness and the state's key witness at sentencing with regard to Delma Banks' alleged future dangerousness, as a paid government informant; (2) the suppression of highly probative documentary evidence that would have destroyed the credibility of the state's key guilt-phase witness, Charles Cook; (3) the denial of a deal with Charles Cook that resulted in the dropping of arson charges against Cook shortly after he completed his trial testimony and (4) the failure to correct perjured testimony from both Farr and Cook. Moreover, those violations of the well-settled *Brady* doctrine—which occurred despite the District Attorney's written assurances of full compliance with such requirements—were exacerbated by numerous instances of improper argument during the prosecution's closing

statements at the guilt and penalty phases that further deprived Delma Banks of a fair trial. The cumulative impact of the prosecution's unconstitutional behavior, combined with the overall weakness of the state's circumstantial case against Mr. Banks, require the reversal of the conviction and death sentence and the granting of a new trial.

a. Governing Legal Principles

As the Supreme Court has recently reaffirmed, "[t]he prosecution's affirmative duty to disclose evidence favorable to the defendant can trace its origins to early 20th century strictures against misrepresentation . . . ." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). The Court has repeatedly admonished that governmental deception of the court and jury, or knowing suppression of evidence favorable to the accused, represents conduct inconsistent with the most "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Those principles are "of course most prominently associated," *Kyles*, 514 U.S. at 432, with the Court's decision in *Brady v. Maryland*, in which the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87-88 (1963).

In subsequent cases, the Court has clarified the scope of the *Brady* doctrine and the showing a defendant must make to establish a violation. In *Giglio v. United States*, the Court explicitly held that nondisclosure of impeachment evidence, such as a promise of non-prosecution, may establish a

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Id. In this case, there is far more than "any reasonable likelihood" that had Farr been cross-examined about his motives for testifying and about his role in bringing about the trip to Dallas during which Banks allegedly retrieved a gun

for use in robberies, the jury's adjudication of Mr. Banks' future dangerousness would have been affected. Therefore, Mr. Banks' sentence of death must also be vacated.[5]

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[5] In the face of this overwhelming evidence of prosecutorial misconduct, the Director asserted at the hearing that Mr. Banks should be barred under *Keeney v. Tamayo Reyes*, 504 U.S. 1 (1992), from raising any facts concerning Robert Farr's informant status, because Farr might have been willing to recant his trial testimony and confess his informant status during state court proceedings. FH 13-14. The Director's argument is premised on the novel proposition that acknowledged *Brady* material should be sought from the suspected informant himself, rather than from the prosecutor. The practical import of the Director's position is clear: if courts were to apply *Keeney's* procedural default rule in cases where, as here, the prosecution has assured compliance with *Brady* requirements, defense counsel would be forced in all instances to operate under the assumption that the prosecutor was lying in order to exercise due diligence. Such a system would fly in the face of the well settled proposition that litigants may reasonably rely on the presumption "that public officials have properly dislodged their official duties," *Bracy v. Gramley*, 520 U.S. 899, 909 (1997), and would represent an outright deformity of the adversarial system.

The Supreme Court has recently had occasion to clarify the relationship between a prosecutor's duty under *Brady* and state rules of procedural default. In *Strickler v. Greene*, 119 S.Ct. 1936 (1999), the state had made assurances of *Brady* compliance by way of an open file policy in the prosecutor's office; nonetheless, potentially damaging impeachment material regarding one witness, contained in the police files, was not disclosed by the state and was not discovered by the defendant until federal habeas proceedings. The Fourth Circuit held that the petitioner's *Brady* claim was procedurally defaulted, because despite the prosecutor's assurances of compliance with *Brady*, the petitioner could have discovered the impeachment evidence during state habeas proceedings and therefore could not demonstrate "cause" for failing to raise the claim in a timely manner. *Id.* at 1947. The Supreme Court forcefully repudiated the Fourth Circuit's analysis, holding that in the presence of an explicit prosecutorial assurance of compliance with *Brady*, the petitioner could not be faulted for failure to discover suppressed evidence and had therefore established cause for the default. *Id.* at 1952. All the facts before this Court show the prosecution promised to disclose such evidence, purposefully elected not to do so, and that Mr. Farr became willing to

ii Suppression of Mr. Cook's September statement

The Court has already determined that this document, Petitioner's Ex. B-4, was possessed by the prosecution at trial and that it was not disclosed to the defense at that time, despite its pretrial assurance of disclosure of all discoverable material. Mr. Elliott acknowledged existing law required the disclosure of exculpatory and impeaching material. FH 25-26. It was first disclosed pursuant to this Court's prehearing discovery order. Moreover, the Court finds that the parties agree on the significance of Mr. Cook's credibility to the state's case in chief: he was their key witness.

The Court concludes that Mr Banks has demonstrated the materiality of Exhibit B-4. Indeed, had the defense had access to this document for its cross-examination of Mr. Cook, it is very likely that the jury would have possessed grave doubt about his veracity.

Mr. Cook provided state law enforcement officials with two statements prior to his testimony at Mr. Banks' trial—the first in April, 1980 and the second in September, 1980. The second statement frequently contradicted and gravely undercut the believability of the first statement. The state's failure to provide Cook's second statement to counsel denied Mr. Banks access to crucial impeachment evidence that would have provided the jury uniquely invaluable information upon which to evaluate Cooks' credibility.

As a general matter, Cook's testimony filled numerous evidentiary gaps that organize around four themes. First, Cook's testimony purported to generally follow April statement to the police, and, therefore, corroborate that statement. This was important because that April statement contained details about the murder that could have been told

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disclose both his status and the falsehoods of his testimony only after all state remedies were exhausted.

to Cook only by the murderer and was provided shortly after his first contact with the police, before the police could have fed him facts about the crime. Second, Cook's testimony described the circumstances surrounding Banks' arrival in Dallas. This testimony was critical because the time of his arrival provided the state with an apparently believable time-frame in which Banks could have committed the murder and driven to Dallas, and the description of the events surrounding his arrival abetted the inference that Banks had committed the murder.

Third, Cook's testimony provided the state with a confession that it otherwise lacked. Although it goes without saying that confessions are critical pieces of evidence, this confession was uniquely important because there was no apparent motive for the murder, the events precipitating the murder did not foreshadow a violent crime, and the State possessed no other evidence linking Mr. Banks to Mr. Whitehead's death. Finally, Cook's testimony provided a complete explanation as to why the state could not present physical evidence from the crime, such as the car, that would link Mr. Banks to the crime.

After careful review, the non-disclosed September statement contains voluminous evidence that Charles Cook's trial testimony was inaccurate, fabricated, coached, and, in some instances, simply a boldface lie. Its non-disclosure denied Mr. Banks access to evidence that could have rendered Cook not worthy of belief.

a. <u>The September Statement Reveals that Cook's April Statement was Tainted By Police Threats And Police-Supplied Details of the Crime</u>

Charles Cook first gave a statement to the police on April 24, 1980, FH Pet. Ex. B-2. That statement contains information about the murder that presumably could have

only been told to Cook only by someone with direct knowledge of the killer. Yet the non-disclosed exhibit contains evidence that could have led the jury to conclude that the law enforcement officers corrupted the April statement, first by threatening Cook with prosecution and then by giving him critical details about the crime. This information casts grave doubt as to the origin and trustworthiness of the information contained in the April statement.[6]

For example, Cook stated that when the police arrived at his house, Huff said, "you just gave this pistol to Delma Banks." FH Pet. Ex.B-4 at 16. According to Cook, Huff then said, "Did you know that Delma Banks was wanted for murder?" *Id.* Cook stated that after he responded affirmatively to this question, Officer Huff said, "[Y]ou mind telling us about it?" Cook then stated that before he responded, Huff said, "*We can get you to help us.*" *Id.* (Emphasis added).[7] As a result, Cook stated that he agreed to cooperate with Officer Huff. *Id.* Finally, while describing these events, Cook identified Huff by name.

The undisclosed statement also reveals that Cook initially maintained that the police had not assisted him with his statement. But only minutes later, he acknowledged that he was given significant details about the murder. In that regard, Assistant District Attorney McDaniel, after listening to Cook recount his story, asked, "Did the police officers sit down and discuss what all they knew about the case before you gave your statement?" *Id.* at 19. In response, Cook said, "No sir."

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[6] As previously noted, Charles Cook testified before this Court that the April statement was misleading and inaccurate and included significant portions that were provided to him by Mr. Huff shortly after he first met Huff in the early morning hours of April 24.

[7] At the hearing, both Cook and Huff agreed that Cook was frightened during this meeting. Cook explained that he was scared because he feared that he would be implicated in a murder and wanted to avoid that at all costs. *See* FH at 141-42.

Id. Thereafter, McDaniel, said, "They just told you to sit down and write it." *Id.* Again, Cook said, "Yes sir." *Id.* McDaniel asked one last time, "And nobody helped You?" *Id.* Cook maintained his position, stating "No. Sir. I was in a room by myself." *Id.*

In response to McDaniel's additional probing, however, Cook contradicted his previous position, stating on three different occasions that he knew the exact date that Banks had first come to Dallas (April 12, 1980) because *the police had told him* the date of the murder prior to his giving this statement. *Id.* at 19-20. Additionally, Cook stated that prior to his giving his statement, *the police had also told him* when the murder had taken place, and specifically referred to the murder victim as a "white boy." *Id.* at 20.

Cook did not acknowledge that he was threatened at his house or that the police had assisted him with his statement. Cook did, however, testify to contradictory events, indicating, for example, that he remembered the date Banks arrived in Dallas because the previous week was Easter, and that he did not remember the names of any of the officers who were at his house that night. 9R 2285; 2306.

b. <u>The September Statement Reveals that Cook's Trial Testimony was Rehearsed, Coached, Inconsistent, and, Untruthful</u>

Mr. Cook testified at trial that he had never spoken to *anyone* about his testimony and that Mr. Raffaelli put him on the stand without knowing what he would say. 8R 2314. This was a lie. The non-disclosed September statement unequivocally contradicts this testimony. It reveals a pattern whereby the prosecution team repeatedly altered critical elements of Charles Cook's testimony that were either not consistent with his original police statement or were not to their liking, and, thereafter, replaced them with a version of events that was

extremely helpful, if not absolutely necessary, to the success of their case.

i. The Events Surrounding Banks Arrival in Dallas

Cook began his trial testimony by stating that Banks arrived in Dallas on Saturday, April 12 between 8:00 and 8:30 in the morning and that he independently remembered the date because the previous week was Easter. 9R 2285. Prior to trial, however, Cook stated that he was able to determine the date only because *the police had told him* the date that Whitehead was murdered. FH Pet. Ex B-4 at 20. Immediately thereafter, Cook testified that Banks asked him whether he would take him to a motel because he did not know anybody in Dallas. 9R 2287. In Cook's practice sessions, however, Cook stated the exact opposite—he offered to take Banks to a motel. FH Pet. Ex B-4 at 5.

Cook testified at trial that he saw blood on Banks' pants shortly after they dropped of Cook's wife at work, and that as a result, once they arrived back at Cook's house, he offered Banks a change of clothes. In the April statement, however, he stated that he saw the blood only *after* he took Banks back to his home and *after* Banks changed clothes, which, of course, would be highly unlikely. Initially, during the pre-trial sessions, Cook stated that he saw the blood on Banks' pants after he (Banks) took Cook's wife to work that morning. FH Pet.Ex.B-4 at 5. In response to these discrepancies, Assistant District Attorney McDaniel berated Cook, asserting, "Your statement [to the police] is obviously screwed up." *Id.* at 24. Moreover, McDaniel said, "It does not make any sense that he changed clothes and you got back into the car went ridding and then you noticed blood on his pants because if he changed clothes he wouldn't have had any blood on his pants." *Id.* Finally, McDaniel provided specific advise on how to handle this problem if it arose at trial. He said, "[T]hey are going to ask you about it and you are just going

to have to explain it. That you might [sic] a mistake and you got your facts out of sequence." *Id.* at 24.

Immediately thereafter, once McDaniel had "corrected" the sequencing of when Cook had given Banks the clothing, he questioned Cook about still other contradictory statements that Cook made about the color of the clothing. *Id.* at 24. Initially, during Cook's pre-trial testimony, Cook stated that "[he] put him in a pair of blue pants," and "a [blue] flowered shirt to go with [his] blue pants." Previously, in Cook's April statement, however, Cook gave a different account, stating that he gave Banks a brown pair of pants and blue shirt. McDaniel, therefore, told Cook, "Your statement right her [sic] says I put him in some brown paints and a blue shirt. You told me you put him in bloue [sic] pants a blue flowed shirt." *Id.* In response, Cook acknowledged that his April statement was incorrect. *Id.*

Shortly thereafter, leaving nothing to chance about the color of the clothes at trial, McDaniel told Cook how his statement should read; "Anyway, *the way this statement should read is that* . . . on the way back [from the hotel] you noticed blood on [Banks'] pants so you took him home and changed his clothes[.]" *Id.* at 26. (Emphasis added). Apparently, Cook got the message. At trial, Cook testified to that order of events, and, furthermore, avoided giving any description of the clothing. 9R 2281-2291.

ii. The Confession

At trial, Cook testified that Banks confessed to him. The pre-trial practice sessions reveal gaping inconsistencies between the version of events presented at trial and the version explored prior to trial. For example, when first discussing the events that immediately preceded the confession, Cook did not mention that he had told Banks that he had been to jail two times and that he did not want any trouble in his home. *Id.* at 8-9. Additionally, Cook gave a

conflicting account on the number of times that Banks told him that he shot Whitehead. *Id.* According to Cook, "[Banks] say [sic] took out the 25 automatic and shot him . . . he said pow and shot him again . . . and he shoot [sic] him again to make sure he [sic] dead." *Id.* at 8. Immediately thereafter, McDaniel, recognizing that the statement was inconsistent, said, "Okay, I want you to go back over all that again. Tell me again what all he told you." *Id.* Cook, once again, indicated that Banks told him that he shot Whitehead three times. *Id.* at 9.

Finally, Cook gave a different motive for the killing than he gave at trial. During Cook's pretrial sessions, he said on at least two different occasions that Banks killed Richard Whitehead because Banks wanted to steal Whitehead's car. Cook initially said, "I say why you shoot the man? Why you do it like that man? [Banks] said uh I don't know man I wanted his car man." *Id.* at 9. McDaniel, in response, said, "Say that again. I don't think it came in on the tape." *Id.* Cook responded, "I say man why you shoot the boy? Why do you do it like that man? [Banks] said man I don't know man I wanted his car." *Id.*

Although Cook was asked to repeat his testimony on more than one occasion, he failed to mention the reason why Banks confessed to him, but nonetheless volunteered this information in his initial statement to the police. Likewise, although Cook maintained on two separate occasions that Banks told him that he killed Whitehead because he wanted to steal his car, Cook told the police that Banks told him that he killed Whitehead "for the hell of it." Finally, although Cook maintained on two separate occasions that Banks told him that he shot Whitehead three times, Cook told the police Banks told him that he shot Whitehead four times.

Aware that these discrepancies would allow the defense to seriously undermine Cook's credibility, McDaniel took corrective action. After Cook was finished going over

statement for the first time, McDaniel read him the part of his April statement in which Cook said to Banks "tell me the truth because I've been to prison two times[.]" *Id.* at 27. Thereafter, McDaniel said, "[N]ow, I just asked you to go over twice exactly what was siad [sic] between you and [Banks] and you left that out. You didn't say anything about having, you telling him you've gone to prison two times. Did you tell him that you been to prison two times?" *Id.* In response, Cook responded affirmatively. *Id.*

Additionally, and immediately after this question, McDaniel said, "And then you said, I can't stand no kind of trouble at all. Red said, 'Man, me [in] this white boy was in the woods in Texarkana drinking when [sic] I thought about killing him and taking his car to Dallas just for the hell of it.'" *Id.* at 27-28. Noticing that this part of the statement was both inconsistent and incomplete in comparison to the early story that Cook just told him, McDaniel said, "You realize that I just read you is different that [sic] what you told me before?" *Id.* at 28. Cook responded by stating, "Yes, sir." *Id.* Thereafter, McDaniel said, "what's different abot[sic] it?" After correcting several other parts of the statement, however, Cook maintained, once again, that Banks killed Whitehead for his car and did not state anything about Banks wanting to kill Whitehead for "the hell of it." *Id.* at 28. Notwithstanding, someone later placed blocks (i.e., "[]")around the words "just for the hell of it." *Id.*

Finally, McDaniel read the portion of the April statement in which Cook indicated that Banks told him that he shot Whitehead four times. *Id.* at 28-29. Thereafter, McDaniel said, "Now a minute ago I asked you how many times you thought that he shot the boy." *Id.* at 29. After listening to the version in the April statement, Cook said, "Yah, four times." *Id.* McDaniel said, "And you told me you thought three. According to this statement, it sounds like he shot him at least four[.]" *Id.* Providing no direct response, Cook said only,

"Yah, right[.]" *Id.* Sensing that Cook did not know the answer to the question, McDaniel said, "I know that you don't know how many times he shot him[.]" *Id.* Thereafter, Cook acknowledged that McDaniel was correct.

As a result of these pretrial sessions, Cook's trial testimony became more or less consistent with the April statement. Cook stated, therefore, that prior to the confession, he told Banks that he had been to jail two times. 9R 2295. Additionally, Cook stated that Banks told him that he decided to kill Whitehead for the hell of it. *Id.* Finally, Cook stated that Banks told him that he shot him four times. *Id.* at 2126-27.

According to Cook's trial testimony, moreover, immediately after Banks' confession, Cook asked Banks "what he was going to do and [Banks] said he didn't know." *Id.* at 2127. Cook testified that he then said, "well you can't stay here now[.]" but that Banks refused to honor his request, stating "let [me] think about it[.]" *Id.* Refusing to back down to Banks, Cook responded, "You can't stay[.]" However, at that very moment, when Cook was getting ready to kick Banks out of his home Cook testified that he, *for the first time*, noticed that Banks had a gun. *Id.* Cook stated that "[He] was afraid, and [he] left out [sic] of the room and told him to get some rest, think about what he was going to do, you know." *Id.* at 2127-28.

However, in Cook's police statement, he stated that he saw the gun prior to the confession, and, moreover, never mentioned that Banks' threatened him. Even more contradictory, when Cook recounted the events that took place immediately after the confession, Cook never mentioned anything about seeing Banks' gun that night. FH Pet. Ex. B-4 at 9 & 10. Cook then went on to describe the events that took place the next day, indicating that Sunday night he took Banks' gun from him because he wanted to protect his family. *Id.* at 11. After hearing this statement, McDaniel

inquired whether Cook had ever seen the gun before that night. *Id.* Cook responded by stating that the first time he saw the gun was in the console of the car on the morning that Banks arrived in Dallas. *Id.*

Moreover, when McDaniel told Cook that his pre-trial statements were inconsistent with his April statement and asked him whether he could tell him what was wrong with his pre-trial statement, Cook said he did not tell him that he saw the pistol in the console of the car. *Id.* at 28. And yet again, Cook stated not only that he saw Banks' pistol that morning in the car, but that he showed Banks his gun in order to demonstrate that he was not intimidated. *Id.* at 35-36.

The version Cook told at trial is the version that was most helpful to the State's case. This testimony allowed the jury to find that Banks confessed to Cook because it demonstrated that Cook's reaction to Banks' confession was credible. Most importantly, although Cook never seemed to get the story right during the pre-trial sessions, the fact that Cook told the best—and drastically different—version at trial, strongly suggests Cook received additional assistance.

iii. The Disposal of Physical Evidence

Cook went on to testify that he disposed of all of the physical evidence from the crime that Banks brought to Dallas. This was not consistent with remarks made during the pre-trial sessions. For example, although Cook consistently stated that he got rid of the car that Banks was driving, he gave conflicting accounts of the events surrounding the disposal. During the pre-trial sessions, Cook stated that he left the car on "Town Drive." FH Pet Ex. B-4 at 16. Additionally, Cook first stated that he left the car keys in the ignition. *Id.* at 12. Nevertheless, in his April statement, Cook stated he left the car at "Canna Drive," and, furthermore, that he left the car keys under the seat. FH Pet Ex B-2 at 2.

Once again, after Cook finished going over his statement, McDaniel later returned to interrogate him about these two inconsistent statements. McDaniel read Cook his April statement that contained this testimony; McDaniel, however, either did not mention the name of the street or the information was not transcribed.[8] Thereafter, McDaniel said, "Now a minute ago you left the keys in the ignition." FH Pet. Ex B-4 at 30. Going along with the version that was consistent with his statement to the police, Cook said, "I left them up under the seat." *Id.* at 30. Then McDaniel said, "Which one is it[.]" Cook then responded, "I left them under the seat." *Id.* at 30.

Cook's pre-trial testimony regarding the events surrounding the selling of items that were in the car is equally problematic. In Cook's April statement, he indicated that the day after Banks left Dallas, in addition to dumping the car, he sold car's radio, booster cables, and tool box and Banks' pistol to his friend across the street. In Cook's pre-trial statement, however, he made several statements that were inconsistent with his police statement.

For example, Cook stated that Banks sold the car's radio. *Id.* at 13. Additionally, when McDaniel asked Cook when he sold the items, Cook gave a contradictory and internally inconsistent statement, initially indicating that "[he] didn't sell the gun until that Wednesday." *Id.* As a result, McDaniel continued to query Cook about the date, at which point Cook said for the second time that he sold the items on Wednesday. *Id.* Notwithstanding, McDaniel continued to probe Cook on this issue, asking "[A]nd after after [sic] you put him on the bus that Monday afternoon . . . did you take the booster cables, the tool box, and the pistol all over to Bennie at once

[8] The pre-trial statement reads: "[T]he next morning around 6:00 I took the hot car and left it at the end of ____Drive with the keys under the seat." P/Tr 30.

or did you take them over there at different times." *Id.* at 14. Cook responded, "I took 'em over there at once." *Id.* McDaniel then returned specifically to the date: "And what day was that?" Cook changed his response, saying, "This was on a uh it was on a Tuesday instead of a Wednesday. It was on a Tuesday 'cause it was the next day after[.]" *Id.*

Before Cook could finish his sentence, however, McDaniel interrupted, "it was the same day that you dumped the car." *Id.* Cook, however, said, "It was the next day after I dumped the car[.]" which, despite Cook's changing of the date to Tuesday, would have meant that it was actually Wednesday. McDaniel, therefore, said, "You dumped the car Tuesday morning before you went to work." *Id.* at 14. Returning to Tuesday, which would have made Cook's previous statements incorrect, Cook said, "Yeah it was that Tuesday evening." *Id.*

Thereafter, McDaniel moved the questioning along to other matters. After questioning Cook about his other inconsistent statements, McDaniel returned to the question of whether Cook or Banks sold the car's radio. McDaniel, said, "Now you told us that Delma sold that cassette . . . [.]" *Id.* at 30. Cook maintained this position, "Yah, well he sold it to Benny, must have sold it to Benny[.]" *Id.* Again, McDaniel asked, "Well did you sell it to Benny or did he sell it to Benny?" *Id.* Cook said, "Well, he sold it to Benny." As a result, McDaniel asked, "Your statement that you sold it . . . That's not right?" *Id.* Cook said, "No[.]" *Id.*

At trial, therefore, Cook never mentioned anything about where he left the car keys, and, moreover, stated that he left the car on "Canada Drive." 9R 2303-2314. Additionally, Cook stated that he sold his neighbor the gun that Tuesday evening. *Id.* at 2305. Finally, Cook indicated that he sold Jones a green tool box and a set of battery cables, but did not mention anything about a car radio. *Id.* Cook's trial testimony, therefore, would indicate not only that McDaniel's

assistance in the pretrial testimony greatly assisted Cook, but also, given the fact that Cook never seemed to get the story right, that Cook subsequently received additional assistance.

iv. The B-4 is only a Snapshot of Police Abuse

Although Pet. Ex B-4 unquestionably demonstrates that the prosecution withheld information that could have been utilized to destroy the credibility of its most important witness, it also reveals that similar events took place both before and after the instant violation. While Cook's statement suggests these events, the court need only look to the state's own statements to determine that the state withheld information and coached Cook's statements pervasively. After going over all of the aforementioned problems in the statement, McDaniel said, "You are going to get on the stand just like you did this morning." *Id.* at 32. Notwithstanding McDaniel's comment that Cook would be, *once again*, on the stand, all indications from this statement suggest that this conversation did not take place *in a court room*. For example, the first page in the transcript indicates that there were three people in the "room" and, moreover, McDaniel said, "why don't ya'll shut that door, Willie." *Id.* at 1, 22. The inference from McDonald's statement, therefore, is that there were other conversations with Cook in a court room.

Additionally, and perhaps more revealing, during this same period of the testimony, McDaniel said to Cook, "Now, tell me *again* about running into Delma in the jail [sic] in Dallas." *Id.* at 32. Notwithstanding McDaniel's precise question and request that Cook repeat his story, no other reference exists in *any* court document (limiting these documents, of course, to the ones that the State has disclosed) to Cook running into Banks, and, therefore, absent prior communication, such a question would have been impossible. Finally, McDaniel told Cook, "[W]e have gone over what is wrong with the statement and *they will go over and that some more* when get,

[sic] before you testify." *Id.* This last statement, therefore, confirms that Cook would receive still more assistance prior to his testimony.

Likewise, several aspects of Cook's own testimony suggest that there were prior and subsequent conversations with McDaniel and others on the prosecution team. For example, throughout these pre-trial sessions Cook maintained that he saw Banks' gun on the first day that he visited Dallas. However, when Cook testified at trial, his testimony was dramatically different. Additionally, there are numerous other examples cited within the aforementioned testimony that show that Cook's testimony at trial was dramatically different than his pre-testimony. Such a stark changes in testimony, therefore, cannot be considered gratuitous events that happened to benefit the state, but rather the result of a deliberate effort to alter Cook's testimony.

The Court has reviewed the undisclosed statement in some detail. It reveals a literal treasure-trove of inconsistent statements. Moreover, its contains numerous instances where law enforcement officials literally break down and reassemble Cook's narrative so that it rings true and avoids embarrassing cross-examination. Given the importance of Mr. Cook's credibility to the question of whether Mr. Banks is guilty of capital murder, it would be hard to imagine a pretrial statement that could be more significant than does this one.

The prosecutor's decision to withhold this document prevented the jury from playing its most important role—determining the credibility of the state's key witness. It also denied Mr. Banks a fundamentally fair trial.

iv. The Prosecutor's Closing Arguments Compounded These Abuses

The prosecution's repeated use of improper and inflammatory arguments during both the guilt and penalty phases of this trial requires the reversal of Banks' conviction

and sentence as well. A conviction must be reversed if improper prosecutorial argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. De Christoforo*, 416 U.S.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed May 31, 2000].

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

PETITIONER'S OBJECTIONS TO THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN MAGISTRATE JUDGE REPORT

DELMA BANKS, JR., by and through undersigned counsel, respectfully files these objections to the report and recommendation entered in this case on May 11, 2000, and served upon counsel on May 15, 2000.

Introduction

The report and recommendation of the Magistrate Judge (herein "Report") concludes that Mr. Banks is entitled to relief from his capital sentence on two independent grounds, but rejects Mr. Banks' arguments that he is also entitled to relief as to his conviction.

* * * *

doctor to establish that all of the relevant information from the autopsy process virtually rules out a 4:00 am shooting and establishes a later time when Mr. Banks was in Dallas.

Mr. Banks objects to the Report's summary conclusion that counsel was not unreasonable in not developing the evidence that Mr. Banks presented through Mr. Fisher and Dr. Riddick. Establishing that the state's time line was unreliable was absolutely essential to Mr. Banks defense on capital murder. Given that the defense would not dispute the state's evidence that showed Mr. Banks and Mr. Whitehead together on the evening of April 11, and then in Dallas with Charles Cook the following weekend, the time of death and how Mr. Banks traveled to Dallas were critical issues. The record establishes that trial counsel made absolutely no effort to develop this evidence.

The Report concludes that trial counsel's performance in challenging Charles Cook's credibility was reasonable. Report at 16-17. Mr. Banks objects to this finding because the record shows that trial counsel made no effort to prepare his examination prior to trial and fails to address the most important evidence on this point: the prosecution's failure to disclose Petitioner's Hearing Exhibit B-4, Mr. Cook's September, 1980 pre-trial statement. The suppression of this statement, which is loaded with impeaching material, prevented trial counsel from demonstrating that Cook's incriminating testimony was not believable.

4. *The Report Errs in Finding Charles Cook's Recantation Not Credible.*

Mr. Banks objects to the Report's summary finding that Mr. Banks' recantation is not credible and to the application of the law. Report at 17.

There is much record evidence to support Charles Cook's sworn testimony that his trial testimony was coached, that his initial statement to police was the product of fear and contained numerous falsehoods, and that he testified falsely at trial so that his pending arson charge in Dallas would be dismissed. Mr. Banks objects to this finding because the Report discusses none of this evidence.

For example, Petitioner's Exhibit B-4, Mr. Cook's lengthy recorded pretrial statement which was not turned over at trial but was provided to Mr. Banks in this proceeding as a result of the Magistrate Judge's discovery order, provides abundant corroboration that Deputy Huff and members of the District Attorney's office spent hours with him shortly before trial coaching him on how to present his testimony. This document confirms that Mr. Cook is truthful when he claims his testimony was coached. See Proposed Findings at 50-58.

Other evidence not addressed in the Report corroborates Cook's assertion that his initial April, 1980 statement to law enforcement was heavily influenced by the dire circumstances under which it was taken. The events that preceded Mr. Cook giving the first statement are harrowing. Deputy Huff and several other officers entered his home in pre-dawn hours. They did not know who he was but suspected that he, at the very least, had destroyed evidence or aided and abetted Mr. Banks. Not surprisingly, they made it clear to him that he was in big trouble unless he cooperated fully. During a forty-five minute meeting prior to being taken downtown, Cook was given considerable information about the crime. See Proposed Findings at 48-50. It is not surprising that these events scared the wits out of Cook, as both he and Huff acknowledged at the hearing, and that under these circumstances, Cook would choose to include bogus material in his statement to please the police. Moreover, at this time, he was on probation and was a regular drug user.

The Report fails to weigh and consider the wealth of record evidence that corroborates Cook's recantation. This evidence is discussed at length in Petitioner's Proposed Findings at 24-29. The Report considers none of this evidence and instead misapplies the rule that the law looks with suspicion on recantations. Report at 17.[9]

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[9] The Report cites *Spence v. Johnson*, 80 F.3d 989 (5th Cir. 1996) as providing the governing rule. *Spence* applies the rule in the usual context:

* * * *

b. *The Reports errs in failing to consider the merits of the other argument claim.*

The Report concludes that the state court's conclusion that trial counsel defaulted review of improper arguments at both phases of trial forecloses review in these proceedings. Report at 40. This is error.

The improper comments made by the prosecutors during both their g ilt and punishment phase arguments are not few and isolated but are numerous and were made purposefully.[13]

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an acquaintance or former co-defendant of the petitioner recants his or her testimony in later proceedings and little independent evidence corroborates this change. The facts here are vastly different. Charles Cook did not know Delma Banks prior to April, 1980, and has not seen or heard from Mr. Banks since the trial. For years Cook refused to speak with representatives of Mr. Banks, and finally agreed to do so only with great reluctance. He had no motive to help Petitioner; his recantation could only work to his detriment. He appeared at the June, 1999 hearing only because he was under subpoena, and broke into tears during his testimony when he admitted that significant portions of his trial testimony were not truthful. His assertion of being coached does not stand alone but is confirmed by Petitioner's Exhibit B-4; his claim that he testified untruthfully in part to please the prosecution because of his liability on the pending arson charge is corroborated by his sister Carole Cook's testimony in which she, who was also a state's trial witness, testified that Deputy Huff forced her to change her testimony, as well as by his former wife, Ida Martin, with whom he has very little contact, who testified that the state allowed Cook conjugal visits with her each day prior to his testimony to insure that he remained a cooperative state's witness. Thus, while the law does look with suspicion upon recantation, at the s me time it recognizes that some witnesses do lie at trial. Recantation evidence that has independent corroboration is not suspect evidence. Looking at the record facts as a whole, there is much corroboration for Mr. Cook's 1999 testimony. *See Brown v. Wainwright*, 785 F.2d 1437 (11th Cir. 1985); *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991); *Ex Parte Frazier*, 562 So.2d 560 (Ala. 1989).

[13] See Petitioner's Proposed Findings at pp. 60-68 for a full discussion of this issue.

Given their content in the context of this generally weak case, it was unreasonable for counsel to make no objection whatsoever to the remarks. Counsel was ineffective for allowing these comments to go to the jury and their consideration was harmful to Mr. Banks. The Report errs in concluding that Mr. Banks has not shown cause and prejudice for this default.

2. *The Suppression of Favorable Evidence Allegations.*

The Report contains a number of errors in the resolution of these claims.

First, Mr. Banks pleaded in his petition that the prosecution withheld material exculpatory and impeaching evidence. Events thereafter confirmed these assertions. Pursuant to the Magistrate Judge's discovery order and allowance of an evidentiary hearing, Mr. Banks was able to demonstrate that (1) Robert Farr was in fact a paid informant who made significant misrepresentations to the jury during both phases of trial, and (2) the trial prosecutors suppressed at trial a lengthy, pretrial statement made by key witness Charles Cook to law enforcement just prior to trial that contains a wealth of impeachment material as well as evidence that confirms that he was coached and pressured to testify falsely. See Petitioner's Exhibit B-4.

With regard to the Report's treatment of Robert Farr, Mr. Banks objects to two points. The Report finds that "Huff testified that Farr told him Banks was going to get the gun in order to commit armed robberies." Report at 43. This is error. Huff testified that he did not know why Banks was going to get a gun. F.H. at 88. The Report further finds that the non-disclosure of Farr's informant status did not prejudice Mr. Banks during the guilt phase of trial. Mr. Banks respectfully disagrees. The non-disclosure allowed the prosecution to perpetuate a hoax upon the jury: it presented Farr as a disinterested, good citizen witness when in fact he was a professional paid informant. Given the many problems that the state had with its case, disclosure of this factor would

have provided the jury with a strong reason to distrust the state's case, and to wonder whether similar considerations had been offered to Charles Cook. Viewed against the entire record, there is a reasonable likelihood that the jury would have reached a different guilt verdict had the disclosure been made.

With regard to Charles Cook, the Report make no mention or finding as to the non-disclosure of the pretrial statement.[14] This statement, produced only as a result of the Magistrate Judge's discovery order, contains a treasure trove of impeachment material, and compelling evidence that Cook's initial statement in April was contaminated by police threats and police-supplied details of the crime. It also shows that Cook's trial testimony was thoroughly rehearsed, coached and inconsistent with earlier statements.

Mr. Banks is entitled to full relief on the suppression of this statement. Moreover, the failure of the Magistrate Judge to consider this evidence also taints the Report's finding that Cook's recantation is not credible. Mr. Banks objects to the failure of the Magistrate Judge to consider this evidence.

The Report also concludes that Mr. Banks failed to establish that the prosecution suppressed evidence that at the time Charles Cook testified, he reasonably believed that if his testimony pleased the state the trial prosecutor would take action to see that his Dallas arson charge was dismissed. Report at 44-46. This is error.

The Report finds it significant that Cook had given the general substance of his trial testimony to law enforcement prior to picking up the arson charge. The Director and the Report make too much of this fact. Charles Cook had two main worries during the spring and summer of 1980. The first

[14] Given the importance of this material, Mr. Banks' Proposed Findings addresses this issue in detail. See Proposed Findings at pp. 46-60.

arose when the police entered his home in the early morning hours of April 23, and told him that he could be prosecuted for destroying evidence if he did not fully cooperate with them. As a drug addict and probationer, these events scared Cook half to death. Thus, at the time that he gave his initial statement later that morning, he had a legitimate concern about becoming a defendant in this matter as an accessory or aider and abetter. (The record contains law enforcement declarations only to the effect that Cook was never a suspect *in the murder* of Mr. Whitehead, not that he could not be charged with having aided and abetted Mr. Banks or having unlawfully disposed of evidence). His second concern arose with his arrest and detention on the arson charge, and the refusal of the Dallas authorities to dismiss the charge despite his sister-complainant's desire that the case not be prosecuted. This anxiety grew when Dallas authorities later inexplicably filed habitual offender papers that significantly lengthened Cook's possible sentence in the matter a month prior to Mr. Banks' trial.

The Report also appears to credit the trial prosecutor's denials of any deal with Cook. Mr. Banks objects to this finding because it neglects to consider strong evidence that these views are not credible. There is considerable undisputed evidence in the record that the trial prosecutors engaged in repeated acts of misconduct to ensure that Mr. Banks would be convicted and death sentenced. For example, prior to trial, the prosecutors promised to voluntarily disclose *Brady* material in advance of trial. This promise was breached when they failed to disclose, inter alia, Mr. Farr's informant status as well as Mr. Cook's long pre-trial statement. In the face of clear law forbidding the practice, on the eve of trial, the prosecutors moved ex parte and without notice to counsel for an order allowing deputies to drive Mr. Banks from Texarkana to Dallas so that state expert witness Dr. James Grigson would perform an examination for future dangerousness. The Fifth Circuit had expressly condemned this practice as

violating the Fifth Amendment silence right and the Sixth Amendment right to counsel one year earlier,[15] and on the week after Mr. Banks' scheduled trial, the Supreme Court of the United States would hear argument in a case involving this practice.[16] During trial, the prosecutors sat (unprofessionally) silent when their key witnesses Farr and Cook lied to the jury,[17] and compounded the effect of these falsehoods by expressly assuring the jurors that both witnesses had told them the truth. Given this pattern of misconduct and misrepresentation, Mr. Banks believes the prosecutor's assurances of no deal should count for little, and that the many circumstances suggesting a deal be credited.

This pattern of deception seen at trial continued into post-conviction proceedings, and provides still more reasons to reject, not credit, the Director's claim of no deal. In the third state habeas proceeding, Mr. Banks pleaded, as he did in this proceeding, that Farr was a paid informant and that the prosecution knowingly suppressed this fact. We now know that Farr was in fact a paid informant. But in state habeas proceedings, the Director, represented by trial prosecutor Elliott, remained silent on this claim. While he had a duty to answer the allegation truthfully, he chose to make no representation.

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[15] *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979).

[16] *Estelle v. Smith*, 451 U.S. 454 (1981). The Court unanimously held that requiring a capital defendant to submit to interview with a state's mental health professional for the purpose of gathering evidence on future dangerousness in the absence of notice to counsel was a clear Sixth Amendment violation, and a strong majority of the Court found a Fifth Amendment violation as well.

[17] For example, Farr directly mislead the jury was he denied receiving any benefit for his testimony. Cook similarly lied when he denied that he had ever spoken to prosecutors about his testimony prior to taking the stand. In both instances, the prosecutors had a clear duty to correct the misrepresentations. They did not do so.

The Report credits Mr. Elliott's "no deal" representations in this same state habeas proceeding as corroborating his 1999 testimony. They do no such thing. For example, before this Court, Mr. Elliott explained how immediately after the trial, he traveled to Dallas and spoke to an assistant district attorney whose name he had forgotten, but who was assigned to Mr. Cook's arson case, to put in a good word for Mr. Cook. Before the state court, he made no such assertion. Before the state court, he filed an affidavit from a Dallas assistant district attorney named Kevin Bryne, who the Magistrate Judge appears to find was the assistant on the arson case. While it was Mr. Elliott's intent before the state court to pass Mr. Bryne off as the Dallas prosecutor who handled the arson case, close inspection shows that Mr. Bryne was not involved in that case. He handled a case that Mr. Cook picked up in 1981, *after* his testimony in Mr. Banks' case. Mr. Elliott's adding and subtracting before this Court to and from his state court representations on the very same issue provide more reasons to discredit rather than accept this testimony.

Further, Mr. Banks objects to the Report's conclusion that only Cook offered evidence of a deal or threats. The record shows that Mr. Raffaelli had conversations with the Dallas County prosecutors about Mr. Cook prior to trial, and Mr. Elliott confirmed that he visited them immediately after trial to report that Mr. Cook's testimony was valuable. Deputy Sheriff Huff conceded that he discussed the pending case with Mr. Cook. Carol Cook testified that Huff told her that he could see to it that her brother would spend a long time in prison on the Dallas charge. Ida Marie Martin, Cook's former wife, testified about conjugal visits during the trial. All of these circumstances corroborate Mr. Cook's testimony that he fully expected to be rewarded with dismissal of the Dallas charges if his testimony pleased the Texarkana prosecutors. His only surprise concerning this matter was that the case was dropped so quickly after his testimony. Given all of these

circumstances, the Report errs in concluding Mr. Banks failed to establish that Mr. Cook either had a deal, or possessed a reasonable basis to believe, that favorable testimony for the prosecution would led to dismissal of the arson charge.

In footnote 13, the Report finds that no state witness committed perjury and that the prosecutors were not aware of any false testimony from state witnesses. Report at 46. This is plainly wrong. For example, the record shows clearly that the prosecutors knew Farr was a paid informant; when he denied receiving any benefit for his testimony, the prosecutors knew this was untrue. When Charles Cook testified that he had not spoken to law enforcement officials about his testimony prior to trial, the prosecutors also knew this was not true. No only did the prosecutors make no effort to require each witness to correct their testimony, they compounded the prejudice by assuring the jurors that each witness had told them the truth.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353
Judge Folsom

DELMA BANKS, JR.

Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

MOTION TO ALTER OR AMEND JUDGMENT & MOTION FOR ORAL ARGUMENT

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Delma Banks, Jr., respectfully moves the Court for an Order that alters or amends the judgment that was entered by the Court on August 18, 2000. Additionally, he moves for an Order setting a hearing on this motion to allow for oral argument in its support. In support of these requests, Mr. Banks states as follows:

1. On August 18, 2000, the Court filed a Memorandum Opinion and Order and Final Judgment in this matter. Except as noted in the memorandum opinion, the Court adopted the Report entered by Magistrate Judge Malone on May 11, 2000.

* * * *

THE COURT SHOULD AMEND ITS JUDGMENT

Reason No. 1: The Court Did Not Resolve the Important Question of Whether the Prosecution's Failure to Disclose Charles Cook's Lengthy, Eve-of-Trial Interview Violated Due Process

5. There is no disagreement among the parties over the importance of state witness Charles Cook's credibility to the state's case for conviction.[4] If the defense could have provided the jury with sufficient reason to doubt his credibility, the jury most likely would have voted to acquit.

6. Well before trial, the prosecution promised the defense that it would turn over in advance of trial all discoverable material. This promise included exculpatory and impeachment material. It has now been established that prosecutors possessed two pretrial statements concerning Charles Cook, one given in Dallas in April, 1980, Petitioner's Exhibit B-2, and another lengthy one taken in Texarkana just prior to trial. Petitioner's Exhibit B-4. At trial, after Cook testified and delivered the state's most critical evidence—Mr. Banks had confessed to him to shooting Richard Whitehead—prosecutors chose to provide defense counsel with only one—the April statement. *See* Petitioner's Exhibit B-2.

7. Prosecutors did not disclose the much more detailed statement that Cook gave during the weekend prior to trial. *See* Petitioner's Exhibit B-4.[5] This lengthy statement contains devastating impeachment material, and establishes beyond any doubt that Cook's trial testimony, rather than being the

[4] In his opening statement to the jury, then District Attorney Rafaelli told jurors "I think the testimony of Charles Cook is critical. . . ." 9 R 2129.

[5] Prosecutors revealed this statement to Mr. Banks for the first time during discovery in this proceeding and only after Magistrate Judge Malone ordered disclosure of those portions of the District Attorney's file that contained material concerning Charles Cook.

unrehearsed recalling of his April statement that he claimed to the jury, was a tightly crafted, repeatedly rehearsed event. (*See* Petitioner's Proposed Findings at pp.46-60 for a detailed discussion of this document's significance.) Moreover, it contains falsehoods known to the prosecution that the prosecutors let stand before the jury.[6]

8. Given the scope and breadth of impeachment material this suppressed statement contains, it is not possible to conclude that the statement was not "material" within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963) and progeny. Tellingly, the Director has advanced no such argument. Indeed, the Director has not addressed the non-disclosure of this statement in its proposed findings before Magistrate Judge Malone, and thus has waived the opportunity to do so.

9. As Mr. Banks pointed out in his objections, the Magistrate Judge's Report never discusses or resolves the non-disclosure of this important statement. *See* Petitioner's Objections at pp. 23-24. Mr. Banks is entitled to the adjudication of this portion of this due process claim by this Court; its resolution will require the Court to grant relief as to Mr. Bank's conviction because its non-disclosure at trial rendered the guilt determination fundamentally unfair.

* * * *

[6] For example, Cook denied that he had spoken with District Attorney Raffaelli or any other law enforcement official about his testimony. This was surely false as Petitioner's Exhibit B-4 shows beyond doubt that he had spent a significant portion of the previous weekend practicing his testimony with members of the District Attorney and Sheriff Department staff. Thus, both the conclusion of the Magistrate Judge and this Court that the record contains no evidence of Cook committing perjury is erroneous.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

CIVIL ACTION NO. 5:96-CV-353
JUDGE DAVID FOLSOM

DELMA BANKS, JR.,
Petitioner,

v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

RESPONDENT JOHNSON'S RESPONSE TO PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT AND MOTION FOR ORAL ARGUMENT WITH BRIEF IN SUPPORT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Respondent Gary L. Johnson, Director of the Texas Department of Criminal Justice's Institutional Division ("the Director"), by and through the Attorney General of Texas, and files this his Response to Petitioner's Motion to Alter and Amend Judgment and Motion for Oral Argument with Brief in Support. In support thereof, the Director would respectfully show this Court the following:

I.

PROCEDURAL BACKGROUND

The instant case involves a writ of habeas corpus petition brought by Texas death row inmate Delma Banks, Jr. ("Banks"). On May 11, 2000, Magistrate Judge Malone issued a report and recommendation that Banks' writ petition be conditionally granted due to errors impacting the

sentencing hearing. Exhibit "A" at DE[1] 141. Both the Director and Banks filed

* * * *

A. This Court Should Not Alter or Amend its Judgment Based on Banks' *Brady*[2] *Allegations.*

Banks argues that the prosecution possessed two pretrial statements from State's witness Charles Cook—one taken in Dallas in April, 1980 (Banks' Exhibit B-2), and the other taken in Texarkana in September, 1980 (Banks' Exhibit B-4) immediately before Banks' trial. Motion at 3 (referencing Banks' June 1999 evidentiary hearing exhibits). According to Banks, the State only disclosed the April 1980 statement to the defense, but did not provide "the much more detailed statement that Cook gave during the weekend prior to trial." *Id.* Banks argues that the Magistrate Judge's Report "never discusses or resolves the non-disclosure of this important statement." *Id.* at 4. He then asks the Court to resolve the issue and grant relief on Banks' conviction because the non-disclosure at trial "rendered the guilt determination fundamentally unfair." *Id.* This Court is not required to alter or amend its judgment based on Banks' pleadings.

1. *Banks' Brady allegations are not properly before the Court.*

First, Banks argues that Cook's September 1980 statement was revealed "for the first time during discovery in this [federal habeas] proceeding and only after Magistrate Judge Malone ordered disclosure of those portions of the District Attorney's file that contained material concerning Charles Cook."Motion at 3 n. 3.[3] Since Banks did not receive Cook's

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[1] "DE" refers to this Court's computer docket followed by the specific entry number.

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

[3] Magistrate Judge Malone's March 4, 1999, scheduling order required

statement until April 15, 1999 the prosecution's failure to disclose this statement was never raised as a claim in Banks' original federal writ petition because the petition had been filed over three years earlier on March 7, 1996. Exhibit "A" at DE 1 ("3/7/96—Original Complaint filed"). Once Banks became aware of the factual basis for his Brady claim, he should then have sought leave of Court to supplement or amend his federal writ petition to include the new claim. *See* 28 U.S.C. § 2242 ("[The application for writ of habeas corpus] may be amended or supplemented as provided in the rules of procedure applicable to civil actions."); FED. R. CIV. P. 15(a) & (d) (governing amended and supplemental pleadings); Rule 11, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, 28 U.S.C. § 2254 ("The Federal Rules of Civil Procedure, to the extent they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.")

Here, the Court docket does not evidence any attempt by Banks to supplement or amend his writ petition. Exhibit "A" (see all entries subsequent to Banks obtaining Cook's statement during discovery on April 15, 1999). Instead Banks argued the new claim for the first time in his proposed findings and conclusions, and in his objections to the Magistrate Judge's report. Motion at 2 & n. 3.[4] Such action is

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that (6) Respondent shall provide Petitioner with the following material on or before **April 15,1999**:

> b. That portion of the Bowie County District Attorney's file regarding the underlying criminal trial which relates to Charles Cook, Robert Farr, Carol Cook, and Vetrano Jefferson including but not limited to records of contact with the foregoing, preparation notes, interview notes, and all other written or recorded documentation.

Exhibit "A" at DE 74; Exhibit "B," copy of the Court order (original emphasis).

[4] Banks states that "he will reference earlier pleadings which set forth in more detail the merits of the claims discussed below," and he points the Court to his Proposed Findings of Fact and Conclusions of Law filed

wholly insufficient to present the claim to this Court. The Fifth Circuit has held that issues first argued by way of objections to the magistrate judge's findings, conclusions, and recommendations are not considered to be properly before the district court. *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992); *see also United States v. Colon-Padilla*, 770 F.2d 1328, 1334 n. 6 (5th Cir. 1985). When the government has already filed a responsive pleading, as in the instant case, then Banks was required to seek leave of court to amend his pleadings. *Armstrong, supra; see also Barksdale v. King*, 699 F.2d 744, 747 (5th Cir. 1983) (Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend his pleadings once as a matter of course at any time before a responsive pleading is served). Because Banks did not raise his instant allegations in a federal writ claim, the Magistrate Judge did not err in not discussing this specific non-disclosure argument, and the Court is not required to alter or amend its judgment.

Furthermore, Banks' argument that the Director waived his opportunity to address the nondisclosure issue because he failed to argue it in his own proposed findings is meritless. *See* Motion at 4. Proposed findings of fact and conclusions of law are based on the claims raised in the writ petition, as well as on any supplemental or amended writ petition claims—not on allegations raised in the opposing side's proposed findings. For the Director to have argued claims raised for the first time in Banks' proposed findings would have required the Director to be psychic[5] because the Court ordered that

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March 7, 2000, and his Objections to the Findings, Conclusions and Recommendations Contained in Magistrate Judge's Report filed May 30, 2000. Motion at 2 & n.3. However, he never cites to an amended or supplemental writ petition which raises his instant claim.

[5] While Banks did question several witnesses at the June 1999 federal evidentiary hearing regarding Cook's undisclosed September 1980 statement, that action is insufficient to substitute for Banks' failure to amend or supplement his federal writ petition.

both sides submit their proposed findings simultaneously. *See, e.g.*, DE 126 ("The parties shall submit proposed Findings of Fact and Conclusions of Law on or before 12/17/99"). Thus because Banks' allegations concerning Cook's undisclosed September 1980 statement were never properly raised as a claim before the Court, neither the Director nor the Court were ever required to address the issue. Consequently, this Court is not required to alter or amend its judgment.

2. *Even if Banks' allegations were properly before the Court, he is not entitled to relief.*

Even if Banks had properly presented his claim of non-disclosure to this Court, then he would still not be entitled to habeas relief. According to Banks, Cook's undisclosed September 1980 statement "contains devastating impeachment material" and establishes that Cook's trial testimony was not an unrehearsed recalling of his April 1980 statement but instead "was a tightly crafted, repeatedly rehearsed event." Motion at 3-4. Banks also states that "it contains falsehoods known to the prosecution that the prosecutors let stand before the jury." *Id.* at 4.[6] These arguments do not entitled Banks to relief.

First, Banks fails to explain what allegedly "devastating impeachment material" the undisclosed statement contains. *See* Motion at 3-4. At best, he provides only one example

[6] Banks' statement that "it contains falsehoods" is somewhat confusing. In the context of his argument, the "it" refers to Cook's September 1980 statement which was not disclosed to the defense. *See* Motion at 3-4. However, since the statement was not disclosed and, therefore, was never presented to the jury, no falsehood was allowed to stand before the jury. Instead, Banks' argument appears to be that Cook was allowed to testify before the jury, and that his testimony—*not the statement*—contained falsehoods which were not corrected by the prosecution. *See* Motion at 4 n. 6.

where Cook's trial testimony differed from his September 1980 statement:

> For example, Cook denied that he had spoken with District Attorney Raffaelli or any other law enforcement official about his testimony. This was surely false as [Banks'] Exhibit B-4 [Cook's September 1980 statement] shows beyond doubt that he had spent a significant portion of the previous weekend practicing his testimony with members of the District Attorneys and Sheriff Department staff.

Id. at 4 n. 6. However, Banks did not need Cook's September 1980 statement in order to impeach him on this matter. Prior to cross-examining Cook at Banks' trial, defense counsel obtained Cook's April 1980 statement which was also made to police. 8 SR [7] 2143 (renumbered as 9 SR 2312); Exhibit "C," testimony excerpts at 1. Thus if Banks wanted to impeach Cook by proving that Cook had, in fact, spoken with law enforcement personnel prior to testifying, then Banks was clearly able to do so with the April 1980 witness statement he received prior to cross-examining Cook. In addition, it is apparent from defense counsel's questioning of Cook that he was aware the witness had spoken with police because counsel questioned Cook at length about his allegedly testifying in exchange for a deal on pending criminal charges. Exhibit "C" at 3-13. Banks' argument that counsel was unable to impeach Cook as a direct result of not having Cook's September 1980 statement is wholly without merit and does not warrant the Court granting habeas relief.

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[7] "SR" refers to the state court record of transcribed trial proceedings, preceded by volume number and followed by page reference.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353
Judge Folsom

DELMA BANKS, JR.
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

REPLY TO DIRECTOR'S RULE 59 RESPONSE

DELMA BANKS, JR., by and through undersigned counsel, respectfully files this reply to the Director's response to our Motion to Alter or Amend Judgment and Motion for Oral Argument.

Introduction

The Director's response to Mr. Banks' Rule 59 Motion to Alter or Amend Judgment and Motion for Oral Argument evinces a misunderstanding of the record as well as of prevailing law. With regard to the suppression of key state witness Charles Cook's lengthy pretrial statement, he mistakenly charges that Mr. Banks has never asserted such a claim. He further argues that the law favors denial of Mr. Bank's jury discrimination claim on technical grounds. These grounds are not sufficiently weighty enough to foreclose meritorious review of this important race claim. Mr. Banks thus files this short response to demonstrate that the Director is wrong and that he is entitled to relief on each ground.

ARGUMENT

I. *The Due Process-Suppression of Impeachment of Evidence Claim*

A. The Director's Argument that the Cook Impeachment Claim Is New Is Wrong and Completely Ignores the Record

1. The Director seeks to excuse his failure to address Mr. Banks' due process claim regarding suppression of impeachment material on two grounds. First, he contends that Mr. Banks never asserted such a claim. This contention, as we demonstrate below, is patently false. Second, the Director suggests that Mr. Banks' failure to amend his petition precludes consideration of this due process claim. The record demonstrates that this claim was pleaded, argued and briefed on its merits. As Mr. Banks will show, only one still familiarizing one's self with the extensive record in this case could reasonably advance these arguments.[1] The suppression of impeachment material concerning Mr. Cook was advanced at the inception of this case, was a paramount issue at the evidentiary hearing, and received significant attention in Mr. Banks' post-hearing submissions.

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[1] The Director is now represented by his fourth counsel in this matter. Throughout state post-conviction proceedings, the Director was represented by Assistant District Attorney James Elliott. From 1996 through the fall of 1998, the Director was represented in these proceedings by former Assistant Attorney General Meredith Matrinez. From the fall of 1998 until August of 1999, the Director was represented by former Assistant Attorney General Delane T. Hendrix. Just prior to the June, 1999 evidentiary hearing and continuing through August 2000, the Director was represented by former Assistant Attorney General Ann Kraatz. Since mid-August, 1999, the Director has been represented by Assistant Attorney General Katherine D. Hayes.

a. *This Claim* ***Was*** *Pleaded in the Petition*

2. The Director asserts that Mr. Banks did not plead a claim of suppression of impeachment material concerning Mr. Cook in his petition. The Director is mistaken. On page 46 of the petition, Mr. Banks alleged, as one of several due process violations committed by trial prosecutors, that the prosecutors "knowingly failed to turn over exculpatory evidence as required by *Brady v. Maryland*." In this very paragraph, Mr. Banks specifically refers to key state witnesses Charles Cook and Robert Farr.[2]

b. *The Director's Prior Counsel Recognized Mr. Banks Pleaded a Due Process Suppression of Impeachment Evidence Claim*

3. Former counsel for the Director plainly understood that Mr. Banks was asserting a claim that the state had withheld *Brady* material concerning both Cook and Farr. In its Answer, under the heading "The State did not suppress favorable, material evidence," the Director acknowledged that *Brady* imposed "an affirmative duty [upon the trial prosecutors] to disclose to the defense evidence that is both favorable to the accused and material to guilt or punishment," [and that] "such favorable evidence includes impeachment evidence." Answer at 108-109. More specifically, former counsel understood precisely that Mr. Banks was alleging that the state suppressed at trial material impeachment evidence concerning Charles Cook. That attorney wrote: "Banks contends that the State suppressed material impeachment evidence in connection with its witness Charles Cook." *Id.*, at 111.

4. Importantly, the Director has not heretofore complained that he could not ascertain what Mr. Banks was alleging in his petition, nor did he request that the Court direct Mr. Banks to

[2] Mr. Banks cannot be faulted for not providing more detail. He pleaded all that he knew and provided the Director with sufficient notice of this constitutional claim.

be more specific. He understood that Mr. Banks was alleging, *inter alia*, that trial prosecutors had withheld impeachment material concerning Charles Cook.

5. Further, the Director did not assert that he had reviewed the files of the District Attorney nor could he assure the Court that no such material was contained therein. Instead, he took the position that this claim should be rejected because Mr. Banks could not prove the merit of the claim. Thus, the Director's position was that he understood Mr. Banks was pleading a claim that the trial prosecutor had suppressed, *inter alia*, impeachment material concerning Charles Cook, but that it lacked merit because of a lack of proof.

c. *Mr. Banks' Investigation Confirmed a Good Faith Basis to Believe Trial Prosecutors Suppressed impeachment Evidence Concerning Witnesses Cook and Farr*

6. Thereafter, Mr. Banks continued efforts, begun in state court, to establish the merit of this claim.[3] He moved the Court for investigative funds so that he could, *inter alia*, locate and interview Charles Cook and Robert Farr. He also moved for discovery of any document in the state's possession that would confirm the truth of the claim.

7. The investigation of this claim generated considerable evidence in support of Mr. Banks' claim that the state had indeed withheld exculpatory and impeachment evidence concerning both Charles Cook and Robert Farr. In February, 1999, Mr. Banks filed declarations from both state witnesses. *See* Reply to Court's Order of January 21, 1999. In each declaration, prosecution witnesses Cook and Farr provided specific evidence suggesting that the state had indeed

[3] Mr. Banks had been unable to locate Farr while proceedings were pending in state court. A volunteer investigator located and interviewed Cook in January, 1992, but Cook refused to speak with Mr. Banks' representatives thereafter.

suppressed evidence regarding both witnesses that *Brady* undoubtably would require to be disclosed at trial. For example, Cook's declaration said, *inter alia*, that he had engaged in extensive discussions with law enforcement officials about his testimony shortly before trial. *Id.*, at Exh. #1 at 4-6. In his declaration, Robert Farr confirmed that he had served as a paid informant in the investigation of this case. *Id.*, at Exh. #2 at 2. The prosecution suppressed both of these crucial pieces of material evidence prior to and during Mr. Banks' trial.

d. *Magistrate Judge Malone Orders Limited Discovery After Concluding Impeachment Evidence Might Have Been Suppressed*

8. Largely because of this proffered evidence, Magistrate Judge Malone granted Mr. Banks limited discovery and ordered the production of records in the possession of the state that concerned, *inter alia*, interview notes, and all other written documentation concerning Charles Cook. *See* March 4, 199 Order at 2.

e. *The District Attorney's Office Discloses For First Time Impeachment Material Concerning Witness Cook*

9. In compliance with this discovery order, the Director disclosed, for the first time, portions of the District Attorney's file. One lengthy document contained therein was a 74-page transcript of a pretrial interview between law enforcement officials and Charles Cook.[4] By any measure, this document contains significant impeachment material.[5] This document,

[4] On major theme that runs through the entire interview is the interviewing prosecutor's disbelief concerning numerous assertions Cook made to police in his initial April, 1980, statement.

[5] Mr. Banks discussed in detail the significance of this statement in his Proposed Findings of Fact and Conclusions of Law at pp. 46-60. He incorporates that discussion herein.

later marked and introduced at the evidentiary hearing as Petitioner's Exhibit B-04, became one important piece of *evidence* to establish his *claim* that trial prosecutors deprived Mr. Banks of due process of law by suppressing important impeachment material concerning the state's key trial witness.

f. *The Court and Parties Acknowledge that One Issue to be Tried at the Evidentiary Hearing is the Suppression of Impeachment Material Concerning Charles Cook*

10. After these disclosures, and well in advance of the scheduled evidentiary hearing, Magistrate Judge Malone issued an order establishing the issues to which she would allow the parties to submit evidence. Magistrate Judge Malone understood Mr. Banks wanted to present evidence on three issues, the first one being "whether Petitioner's Fourteenth Amendment rights were violated by the state withholding critical exculpatory and impeaching evidence concerning at least two important witnesses—Charles Cook and Robert Farr." March 5, 1999 Order at 1, 2. The Order restated the Director's position on this issue: no such hearing should take place because Banks "has had an adequate opportunity to develop the factual background in state court." *Id.*, at 1. Importantly, the Director made no objection of surprise, no assertion that Mr. Banks had expanded his due process claim, nor any claim that portion of the issues articulated by the Magistrate Judge Malone were unexhausted.

11. Thereafter, the Director provided notice that he would utilize this very exhibit to defend again the due process claim. *See* Respondent Johnson's Witness and Exhibit List, filed April 30, 1999 at 2 ("to defend against the due process claim, the Director will submit as Petitioner's (sic) Exhibit 1, a copy of the entire investigative file of the Bowie County District Attorney's Office in the Banks case"), and indicated further

that he would call Assistant DA Elliott and former Bowie County Deputy Sheriff Willie Huff "to defend against the due process claim." The Cook statement was included in this file. Similarly, Banks made it very clear that he would use the Cook pretrial statement—Exhibit B-4—to establish his due process claim. *See* Petitioner's List of Exhibits at p. 2.

g. The Issue of Whether Trial Prosecutors Suppressed Material Impeachment Evidence Concerning Charles Cook is Tried at the Evidentiary Hearing

12. At the evidentiary hearing, the claim that the prosecutors had suppressed important impeachment material as to Cook and Farr took center stage. Counsel for Banks made an opening statement in which he confirmed that he would prove, *inter alia*, that the trial prosecutors had unconstitutionally withheld impeachment evidence with regard to both Charles Cook and Robert Farr. *See* FH at 8. Moreover, counsel for Mr. Banks examined prosecutor Elliott as to his understanding of the duty to disclose exculpatory and impeachment material. FH 25-27. When counsel examined Elliott about Cook's September statement, Elliott confirmed that the document had *not* been disclosed at trial, Ex. B-04. FH 43-47. On redirect, counsel returned to the issue and asked Elliott to review portions of the exhibit that showed a staff prosecutor coaching Cook how to answer questions concerning his earlier April statement which, in the interviewer's view, made little sense. FH 64-68. On further redirect, Elliott was asked still more questions about inconsistencies between Cook's trial testimony and statements in Ex. B-04. FH 72-74. During the hearing, Mr. Banks moved this exhibit into evidence with no objection from the Director. FH 75.

13. Given the undisputed facts that (1) Mr. Banks actually pleaded a due process claim of suppression of *Brady* impeachment material in his petition, (2) the Director made clear in its first responsive pleading that he understood the

claim to include suppression of impeachment material concerning Mr. Cook, (3) the discovery process forced the District Attorney's Office to reveal for the first time Cook's extensive eve-of-trial statement, (4) the Magistrate Judge and parties agreed that one issue to be litigated at the evidentiary hearing was whether the trial prosecutor's withheld material impeachment evidence, (5) the pretrial statement, Petitioner's Exhibit B-04 was introduced and admitted without objection as evidence relevant to the claims at issue, and (6) state witnesses were extensively questioned about both the circumstances of the taking of this statement and its tardy disclosure, it is simply incredible for the Director to now assert that he had no idea that Mr. Banks was advancing a suppression of impeachment material claim concerning Mr. Cook. Considering this extensive record, it is also remarkable to assert that Mr. Banks was required to amend this claim into his petition after the statement was disclosed in the spring of 1999 in order to obtain review on the merits.

14. While Mr. Banks can only speculate why the Director failed to brief this issue in his post-hearing Proposed Findings, it might well be because that brief was prepared by an attorney who entered the case just prior to the evidentiary hearing, and who had to seek at least three enlargements of time to allow her to become familiar enough with the record to file that submission.

15. On the other hand, it is understandable how this issue evaded Magistrate Judge Malone's attention. This is only one of many cases Magistrate Judge Malone had before her for resolution. This case has an extensive record and presents more than a dozen claims. Few are straightforward and most require attention to collateral issues. Both parties filed Proposed Findings in excess of 100 pages. It is for this reason that Mr. Banks moved for oral argument so that the Magistrate Judge would have the opportunity to thoroughly explore the complexity of each issue with counsel prior to entry of judgment.

B. The Director's Laconic Argument That the Claim Is Meritless Ignores Many Arguments that Demonstrate Its Suppression Violated Due Process

16. Instead of explaining why the content of the suppressed document, Exhibit B-04 would have been of little use in impeaching Cook, the Director faults Mr. Banks for not setting forth his prejudice argument *in the Rule 59 motion*. There is a very good reason why Mr. Banks did not make the argument therein; he presented a detailed discussion of how the state's suppression of this document at trial was highly prejudicial in his Proposed Findings at pp 46-60, and explained in the motion that we was relying upon that pleading to keep the motion short and to the point.

17. The Director's hollow failure to explain the supposed lack of merit in Mr. Banks' suppression claim with respect to Exhibit B-04 points to a conclusion that the Director has no argument that will successfully refute the merits of the claim.

18. In his Proposed Findings, Mr. Banks' explained how the non-disclosure of Exhibit B-04 was clearly prejudicial. That argument remains unrebutted. He is plainly entitled to relief on this claim.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed _____]

Civil Action No. 5:96-CV-353

DELMA BANKS, JR.,
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

ORDER ON PETITIONER'S MOTION TO ALTER OR AMEND THE JUDGMENT AND MOTION FOR ORAL ARGUMENT

Before the Court is Petitioner Banks' Federal Rule of Civil Procedure 59(e) Motion to Alter or Amend the Judgment of this Court entered August 18, 2000, in the above referenced cause, and Motion for Oral Argument (doc. #151). The Court previously adopted the Magistrate Judge's Report and Recommendation conditionally granting Banks' writ of *habeas corpus* due to errors effecting the outcome of the sentencing phase of Banks' trial (doc. #149).

Banks asserts two challenges to the Court's Judgment in his Motion to Alter or Amend. First, Banks contends that this Court did not resolve the issue of whether Banks' due process rights were violated by the prosecution's failure to disclose to the defense State witness Charles Cook's September 1980, eve-of-trial interview with law enforcement officials.[1] Banks

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[1] Cook gave two pre-trial statements to law enforcement officials, one in April, 1980, and the other in September, 1980.

claims that the interview contains impeachment material, offering by way of example the fact that Cook's statement contradicts his testimony that he had spoken with the District Attorney or any other law enforcement official about his testimony.

The Court did not address Banks' claim because it was not raised in his federal writ of *habeas corpus*. Banks' federal writ alleged that the prosecution "knowingly failed to turn over exculpatory evidence" concerning several State witnesses, including Cook. On March 4, 1999, Magistrate Judge Caroline Craven [2] entered an order requiring Respondent to provide Banks with the "portion of the Bowie County District Attorney's file regarding the underlying criminal trial which relates to Charles Cook, . . . including but not limited to records of contact with the foregoing, preparation notes, interview notes, and all other written or recorded documentation" by April 15, 1999. Pursuant to that order, the prosecution turned over, for the first time, Cook's September 1980 interview. Thereafter, Magistrate Judge Craven conducted a hearing on Banks' claims of alleged *Brady* violations.[3]

While Banks' *Brady* claim in his federal writ alleged that the prosecution "knowingly failed to turn over exculpatory evidence," Banks' specific complaint concerning the September 1980 statement was not part of his original federal writ. As Banks states in his motion, the prosecution revealed the September 1980 statement to the defense for the first time after Magistrate Judge Craven ordered disclosure of the District Attorney's file. Motion at p. 3 n.5. Banks' federal writ was filed in 1996, three years before he was aware of the

[2] For clarification purposes, the Court notes that between the Magistrate Judge's Report and Recommendation and the current motion, Magistrate Judge Malone changed her last name to Craven.

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

September 1980 statement. Rather than amend or supplement his writ to include this specific *Brady* violation, however, Banks raised this facet of his *Brady* claim for the first time in his Proposed Findings of Fact and Conclusions of Law, and again in his Objections to the Magistrate Judge's Report and Recommendation. *See* 28 U.S.C. § 2242; Fed.R.Civ.P. 15(a) & (d). Issues first argued by way of objections to a Magistrate Judge's finding and conclusions are not considered to be properly before the district court. *See United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992).[4] Accordingly, Banks' first ground upon which to amend or alter this Court's Judgment must fail.

Banks next contends that no adequate and independent state law ground forbids review of his *Swain* claim.[5] This Court found Banks' *Swain* claim procedurally barred as a result of his failure to object to the venire during trial. Banks claims that he advanced three arguments establishing cause and prejudice to overcome his procedural default, which the Court failed to address. Two of Banks' arguments, that the Respondent waived the default defense and that Banks' attorney had a conflict of interest in raising a *Swain* claim since it would implicate his practices as the former District Attorney, were indeed discussed in the Magistrate Judge's Report and Recommendation. Banks' third argument, that the United States Supreme Court's recent decision in *Saldano v. Texas*, ___ U.S. ___, 120 S.Ct. 2214 (2000), suggests a shift

[4] Further, Banks' argument that the Respondent recognized Banks' specific claim because he paraphrased Banks' complaint as one that "the State suppressed material impeachment evidence in connection with its witness Charles Cook" is meritless. Banks' federal writ alleged that the State failed to disclose, among other things, a deal between Cook and the State to dismiss pending arson charges filed against Cook. The Respondent's paraphrase of Banks' claim was most likely responding to this alleged *Brady* violation.

[5] *Swain v. Alabama*, 380 U.S. 202 (1965).

in state policy concerning the enforcement of procedural bars to claims of intentional racial discrimination raised by capital prisoners in federal court proceedings, is entirely without merit. Banks states that "[i]f there once was a firm rule against hearing defaulted race claims, there no longer is one." Unlike the instant case, *Saldano* concerned the State's punishment phase evidence that individuals of a particular race were more likely to pose a future danger. Moreover, the Texas Attorney General's confession of error in *Saldano* does not extend to a confession of error in the instant case or any other case. Banks' second ground to alter or amend must fail. It is therefore

ORDERED that Banks' Motion to Alter or Amend the Judgment is DENIED.

IT IS FURTHER ORDERED that Banks' Motion for Oral Argument is DENIED.

SIGNED this 20th day of December, 2000.

/s/ David Folsom
JUDGE DAVID FOLSOM
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Civil Action No. 5:96-CV-353
Judge Folsom

DELMA BANKS, JR.,
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,
Respondent.

APPLICATION FOR CERTIFICATE ALLOWING APPEAL

Delma Banks, Jr., by and through undersigned counsel, and pursuant to 28 U.S.C. § 2253(c) and FRAP 22(b), respectfully requests an Order issuing a certificate of appealability so that he may pursue his cross-appeal to the United States Court of Appeals for the Fifth Circuit on some but not all of the claims that the Court found not to warrant relief. In support of this application, Mr. Banks states as follows:

1. This is a capital habeas corpus proceeding. In the Court's final order and judgment, the Court granted Mr. Banks relief from his capital sentence on two grounds: trial counsel's ineffective assistance and the prosecution's suppression of impeachment material concerning key penalty phase witness Robert Farr. The Director has filed a notice of appeal and will ask the Court of Appeals to review these rulings.

* * * *

D. Prosecutorial Misconduct [Claims F & I]

The Court granted Mr. Banks' penalty phase relief because of the prosecution's suppression of Robert Farr's status as a paid informant as well as its failure to correct Farr's misleading testimony before the jury. The Court rejected three other misconduct claims that Mr. Banks respectfully believes are meritorious and warrant relief.

1. *Non-Disclosure of Charles Cook's September, 1980 Statement*

The Court ruled that this claim was not properly before the Court because Mr. Banks failed to amend the claim into the petition after the statement was disclosed by the Bowie County District Attorney three months prior to the evidentiary hearing held in June, 1999. The Court relied upon FRCP 15(a) and (d). We believe that jurists of reason could legitimately debate the correctness of this determination for the following reasons.

We have already pointed out in our post-judgment papers that Mr. Banks did plead a *Brady v. Maryland* claim and that he asserted the prosecution withheld material concerning Charles Cook which it was required to disclose prior to trial. This allegation was sufficient under Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts to alert the Director to the nature and breadth of his claim. Indeed, the Director's counsel, in his answer, understood that Mr. Banks was pleading a claim that charged that the prosecution had withheld, *inter alia*, impeachment evidence that was material. Thus, jurists of reason could conclude that Mr. Banks sufficiently placed the Director on notice that his Brady claim rested in part upon the non-disclosure of impeachment material.

Even if that were not the case, FRCP 15(b) provides that "when issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all

respects as if they had been raised in the pleadings." This issue of the state's suppression of impeachment material concerning Charles Cook was "expressly tried" at the June, 1999 evidentiary hearing. In ruling prior to the hearing on which issues the parties would be permitted to submit evidence, the Magistrate Judge identified as one such issue: "whether Petitioner's Fourteenth Amendment rights were violated by the state withholding critical exculpatory and impeaching evidence concerning . . . Charles Cook." March 5, 1999 Order at 1, 2. At the June, 1999 hearing, the September statement, Petitioner's Exhibit B-4, was introduced into evidence without objection and the trial prosecutor and other witnesses at the hearing were examined extensively as to its content, and whether it was disclosed pretrial, by both counsel for Mr. Banks and the Director.

Mr. Banks thus believes that jurists of reason could legitimately disagree with the Court's conclusion that this claim was not properly placed before the Court by Mr. Banks. Moreover, this suppressed exhibit contains devastating impeachment; given the central importance of Charles Cook's credibility to the state's guilt case against Mr. Banks, it is inconceivable its non-disclosure could be held to be non-material, or harmless.

2. *Suppression of Deal For Cook Testimony*

The record contains strong evidence from several *prosecution* witnesses which corroborates Charles Cook's hearing testimony that, in fact, he testified at trial pursuant to a deal in which his pending arson charge would be dropped if he provided the prosecution with favorable testimony

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

[Filed Feb. 20, 2001]

No. 5:96cv35 3

DELMA BANKS, JR.,
Petitioner,

vs.

GARY JOHNSON, Director, Texas Department of
Criminal Justice Institutional Division,
Respondent.

ORDER

This matter comes before the Court on Petitioner Delma Banks, Jr. ("Banks") application for a certificate of appealability, filed on February 2, 2001. On August 18, 2000, the Court adopted the Magistrate Judge's Report and Recommendation conditionally granting Banks' petition for writ of *habeas corpus* if the State did not vacate Banks' death sentence and impose a sentence less than death, or order a new punishment hearing. On January 24, 2001, Banks filed a Notice of Cross-Appeal.[1] Under 28 U.S.C. § 2253, a petitioner may appeal from a final order denying his petition for writ of *habeas corpus* only if he has first been granted a certificate of appealability. To obtain a certificate of appealability, Banks must make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(1)(A). Specifically, Banks must demonstrate "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented

[1] Respondent Johnson filed a Notice of Appeal January 11, 2001.

were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Banks asserts that he is entitled to a certificate of appealability on the following issues:

1) Ineffective assistance of counsel

2) Improper exclusion of jurors

3) *Swain v. Alabama* claim

4) Prosecutorial misconduct

5) Bias juror claim

6) Sufficiency of evidence regarding future dangerousness

Banks' first claim is that his counsel was ineffective at the guilt phase of his trial because counsel failed to investigate any of the evidence, or interview any of the witnesses, prior to trial. Banks asserts that any reasonable effort by defense counsel would have revealed "substantial credible evidence" that would have cast doubt upon the State's case. Specifically, Banks contends that counsel should have reviewed the autopsy report, consulted with a forensic pathologist, and interviewed Mike Fisher, the witness who testified he heard gunshots at approximately 4:00 am the morning of the murder. Had counsel pursued this evidence, he would have found it supported the opinion of Dr. Reddick, an expert in forensic pathology who testified at the evidentiary hearing, that the victim was actually shot when Banks was in Dallas. Further, Banks claims that if counsel had spoken to witnesses who saw Banks and the victim together, counsel would have learned that the victim's car, which Banks allegedly stole and drove to Dallas, had severe mechanical problems and likely could not have made it to Dallas.

There was evidence offered at trial from State's witnesses that the victim was killed at about 4:00 am the morning of the murder, as well as testimony from Dr. Reddick at the

evidentiary hearing that it was possible that the victim was killed at the time Fisher heard the gun shots. There was also evidence that Banks was seen in Dallas, driving the victim's car. Based on this evidence, the Court found that Banks had failed to satisfy either prong of *Strickland v. Washington*, 466 U.S. 668 (1984). Banks has not persuaded the Court that this issue is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' first claim.

In his second claim, Banks alleges that prospective jurors Juanita Swainger and Amy Rogers, who voiced general opposition to the death penalty during *voir dire*, were improperly excluded from jury service. Banks contends that the trial court applied the wrong standard in excluding each juror, and as such, the presumption of correctness of the trial court's decision does not apply. Banks does not reveal what incorrect standard the trial court applied, nor explain the trial court's error.

This Court noted that the standard governing juror qualification in a capital case is whether the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Acknowledging that the trial court used this standard, and giving the court's findings a presumption of correctness, this Court then held that the exclusion of these jurors did not violate Banks' constitutional rights. Banks' has not persuaded the Court that this issue is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' second claim.

Banks' third claim is that the prosecution improperly excluded prospective minority jurors in violation of *Swain v. Alabama*, 308 U.S. 202 (1965). Banks' counsel failed to

object to the composition of the jury panel at trial. This claim was first raised in Banks' initial state writ of *habeas corpus*, where it was addressed on the merits and denied. Banks asserted the claim again in his third state writ. In response, the State urged for the first time that it be denied because counsel had failed to lodge an objection at trial. Following an evidentiary-hearing on the claim, the state court found that no *Swain* claim was raised at trial and although defense counsel knew of the possibility of such a claim he chose not to raise it because he did not believe the prosecution's conduct gave rise to the claim.

This Court held Banks' claim was procedurally barred because the last state court to consider the claim based its denial of relief on a state procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This case, however, is not a true procedural default case, and indeed, raises a unique issue. The state court's decision in Banks' first writ addressed the merits of his claim, and denied the claim on the merits. The second time Banks raised this claim, in his third state writ, the state court denied the claim on the basis that Banks failed to object at trial, as well as on the merits. When the claim was raised in this Court, the Court focused on the state court's decision denying this claim on the grounds Banks failed to make a timely objection to the exclusion of minority jurors at trial.

It is not clear to the Court why Banks' claim was not dismissed for abuse of the writ when it was raised for the second time in his third state writ. If it had been dismissed, the Texas Court of Criminal Appeals would not have reached the issue of Banks' failure to object at trial, and this Court presumably would not have addressed that issue. As such in light of the fact that Banks had preserved the claim in his first state writ this Court's failure to address the merits of Banks' *Swain* claim would have been error, if the merits had not been addressed.

However, the Court did address the merits of Banks' *Swain* claim, albeit in the context of his ineffective assistance of counsel claim. While the Court's discussion on the merits was not explicit in its earlier opinion, the Court now makes such findings explicit. In § A 3 of the Magistrate Judge's Report, she discussed the trial courts findings that Banks' trial counsel was aware of the *Swain* case, and that based upon his observation of the newly elected district attorney's prosecution of a black defendant for the rape of a white victim, wherein the district attorney allowed two blacks to sit on the jury, counsel believed a *Swain* claim would be frivolous. The Magistrate Judge also set forth the trial court's findings on the Swain claim in § E of her Report. The evidence presented at the state trial court's hearing supports the court's conclusion that the jury selection process in Banks' trial was racially neutral.[2] Based on the foregoing, Banks' has not persuaded the Court that his claim that minority jurors were excluded is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' third claim.

Banks' fourth claim alleges three instances of prosecutorial misconduct: the prosecutor failed to disclose witness Charles Cook's September 1980 statement to police, the prosecutor suppressed information about a deal between Cook and police and the prosecutor made improper summation arguments. The Court did not address Banks' claim concerning the September 1980 statement because the claim was not raised in Banks' federal writ. Banks argues that he did in fact plead a *Brady v. Maryland*, 373 U.S. 83 (1963), claim concerning Cook's September 1980 statement to police. For support, Banks relies upon his belief that the Respondent's answer showed that it understood Banks' pleading, as well as the Magistrate

[2] Banks' other challenges to the Court's resolution of this claim are moot based on the Court's treatment of the claim on the merits.

Judge's identification of one of the issues to be addressed at the evidentiary hearing as "whether Petitioner's Fourteenth Amendment rights were violated by the state withholding critical exculpatory and impeaching evidence concerning . . . Charles Cook." Banks' points to Fed.R.Civ.P. 15(b)'s provision that "when issues not raised in the pleadings are tried by express or implied consent of the parties they shall be treated . . . as if they had been raised in the pleadings."

As discussed below, Banks' federal writ did allege that the State failed to disclose a deal between Cook and the State to dismiss Cook's pending arson charges. The Respondent's answer to Banks' writ, which Banks claims shows that the Respondent had knowledge of the September 1980 statement claim, was most likely responding to Banks' claim concerning Cook's deal with police. The same can be said of the Magistrate Judge's identification of the issues at the evidentiary hearing. It is interesting to note that Banks filed his federal writ in 1996, three years before he was aware of the September 1980 statement. Banks has failed to persuade this Court that jurists of reason would debate that either of these two examples showed that he had raised the specific issue of the prosecutor's suppression of the September 1980 statement in his writ.

Banks next asserts that the "record contains strong evidence from several prosecution witnesses" which corroborates witness Cook's claim that he testified at trial pursuant to a deal in which his pending arson charge would be dropped if he testified against Banks. Banks has failed to identify any of the alleged prosecution witnesses who would support this claim, or to inform the Court what evidence these witnesses would provide. As a result, he does not persuade the Court that his claim that the State suppressed a deal between Cook and police is debatable among jurists of reason.

Finally, Banks asserts that the Court erred in denying relief on his claim of improper summation arguments on two grounds; first, that the claim was procedurally barred and second, that the prosecutor did not have a manifest intent to comment on Banks' silence.

Banks contends that his counsel was ineffective in failing to object to the prosecution vouching for witness Cook's credibility, and therefore, that he has shown "cause" for the default in not objecting at trial. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law. *Id.* The Court concluded that Banks failed to show that his attorney's conduct in not objecting to the prosecution's argument prejudiced him under *Strickland*, and therefore, that his attorney was not ineffective. Banks does not attempt to demonstrate that the Court's conclusion was incorrect.

Next, Banks argues that the Court did not apply the correct line of cases in reviewing the issue of the prosecutor's alleged comment on Bank's failure to testify. However, Banks does not explain why the case law that the Court relied upon was incorrect, nor does he cite cases that the Court should have reviewed. As such, Banks has not persuaded the Court that the foregoing issues are debatable among jurists of reason. The Court will deny Banks a certificate of appealability on his fourth claim.

Banks' fifth claim alleges that his death penalty was determined by jurors who improperly based their decision, in part, on extraneous religious factors. Banks contends that the Court denied relief on this claim after concluding that the state court's decision that juror Wanda Wyatt was not biased was entitled to a presumption of correctness, even thought the

state court's findings focused exclusively upon her views on race. Juror Wyatt testified at the state evidentiary hearing that she did what she had to do in this case based on the evidence, noting that the Bible says to obey the laws of the land. Based on this, as well as other testimony, the trial court found that juror Wyatt relied on the evidence in reaching her verdict. In reviewing the claim, this Court, as well as the trial court, addressed juror Wyatt's faith-based views. Banks has not persuaded the Court that this issue is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' fifth claim.

In his final claim, Banks challenges the sufficiency of the evidence concerning future dangerousness. This Court found that Banks' claim was barred under the procedural default rule because the state trial court rejected the claim as procedurally barred in Banks' third state writ. Much like the argument he makes in his third claim, Banks contends that the Court should have addressed the merits of his sufficiency claim because the state trial court addressed the merits of this claim in his first two state court writs. Assuming *arguendo* that Banks' representation of the procedural history of his state writ proceedings is correct, this Court should have addressed the merits of Banks' sufficiency claim.

Again, while not explicit, the Court did address the merits of Banks' sufficiency claim. The Court recited the Texas Court of Criminal Appeal's statement of the underlying facts of this case, facts which in and of themselves may be sufficient to support the jury's affirmative answer to the future dangerousness special issue. *See Bell v. Texas*, 938 S.W.2d. 35, 42 (Tex.Crim.App. 1997) (citing *Bell v. Texas*, 724 S.W.2d 780, 803-04 (Tex.Crim.App. 1986) (finding facts of the offense alone "indicate[d] a propensity, perhaps even an appetite, for violence")). The victim, a sixteen year old

boy, was shot three times, twice in the head and once in the upper back. One of the shots had been fired at a maximum distance of eighteen to twenty-four inches. Witness Cook testified that Banks told him that Banks "decided to kill the person for the hell of it and to take his automobile to Dallas." This evidence is constitutionally sufficient to support the jury's finding that there was a probability that Banks would pose a future danger. Banks has not persuaded the Court that this issue is debatable among jurists of reason or that the question is adequate to deserve encouragement to proceed further. Accordingly, the Court will deny the application for a certificate of appealability on Banks' sixth claim.

Having found that Banks has failed to demonstrate that any of the issues he raised are debatable among jurists of reason, IT IS HEREBY ORDERED that a certificate of appealability is DENIED on all of Banks' claims.

SIGNED this 16th day of February, 2001.

/s/ Judge David Folsom
JUDGE DAVID FOLSOM
United States District Court Judge

DECLARATION OF ROBERT LEE FARR

County of San Bernardino)
) **Declaration of Robert Lee Farr**
State of California)

I declare, under penalty of perjury, that the following is true:

1. My name is Robert Lee Farr. I currently live in California. I am over eighteen years of age. I have read this document and believe everything written in it to be true.

2. I testified at the capital murder trial of Delma Banks, Jr. in Texarkana, Texas in September of 1980.

3. Both before and after Delma was arrested for killing Richard Whitehead, I worked as a police informant for the Bureau of Alcohol, Tobacco, and Firearms; the Texas Department of Public Safety; and the Texarkana, Texas police department. For several years, I supplied information to police officers to help them make cases against drug dealers, a doctor, and pharmacists in Texas and Oklahoma. The ATF agent I worked for was in Oklahoma. The Texas DPS officer I worked with was Dale Hampton in Texas. Sometimes the police agencies paid me money for my work. The police also would let me falsify prescriptions for drugs that I was addicted to without arresting me because of my work for them. Several of the police officers knew that I sold pills.

4. I did not know Richard Whitehead. The only thing I knew about his murder is what I saw in the news. It was a very high profile case and was reported on the TV and in the newspapers constantly.

5. About one week before Delma's arrest, Willie Huff, a police officer with the Bowie County Sheriff's

Department, asked me to work for him on his investigation of Delma. Willie stopped me outside my doctor's office and asked me to get into his car. While I sat in his car, Willie asked me to help him with a case. He did not tell me that this case had to do with Richard Whitehead's murder.

6. I assume Willie Huff came to me because I was married to Sharon Jefferson, Delma's girlfriend's sister and so I knew the same people Delma knew. Like a lot of other policemen in the Texarkana area, Willie knew that I used and sold pills with false prescriptions. I assumed that if I did not help him with his investigation of Delma that he would have me arrested for drug charges. That's why I agreed to help Willie. I was afraid that if I didn't help him, I would be arrested.

7. Willie first asked me if I knew Delma and I said yes. Willie Huff asked me to help him find Delma's gun. I told Willie that he would have to pay me money right away for my help on the case. I think altogether he gave me about $200.00 for helping him. He paid me some of the money before I set Delma up. He paid me the rest after Delma was arrested and charged with murder. He said that the case was worth a lot more than that to him. He did not tell me at that time that Delma was a murder suspect in the case of Richard Whitehead. He only told me that he wanted me to help him find Delma's gun.

8. In order to help Willie Huff, I had to set Delma up. I told Delma that I wanted to rob a pharmacy to get drugs and that I needed his gun to do it. I did not really plan to commit a robbery but I told Delma this so that he would give me his gun. I talked a lot about my plan to Delma and finally convinced him that I needed his gun for the robbery. That's when Delma

told me his gun was in Dallas. I convinced Delma to drive to Dallas with me to get the gun.

9. After I convinced Delma to give me his gun, I called Willie Huff and told him that Delma's gun was in Dallas. I also told Willie that Delma and I were going to drive to Dallas to get the gun. I knew that Willie would follow us to Dallas because he told me during that conversation that he would follow us. This was the third or fourth conversation I had with Willie.

10. Delma, Marcus Jefferson and I drove to Dallas in my car. I had drugs with me. When we got to Dallas, we stopped at a man's house and Delma went to the house and came back with a gun. After we drove from the house, our car was pulled over by the police on the interstate. I was taken to the Dallas police station with Marcus. I don't know where Delma was taken because he was in a different police car. I was allowed to leave. I wasn't charged with anything.

11. While I was at the Dallas police station, I saw Bowie County D.A. investigator, Charlie Leathers. He told me that Delma was going to be charged with murder because they had found the murder weapon. I asked Charlie for money to help me get home and he gave me about $25.00. Charlie knew that I had convinced Delma to go to Dallas because Willie Huff had asked for my help. I knew that Charlie and Willie were working together on the investigation of Delma.

12. At some point before Delma's trial, the District Attorney's office asked me to come by to look at two guns that they had. Both the District Attorney Louis Raffaelli and Charlie were there. They asked me if I recognized either of the guns, and I told them that I did not.

13. Less than a year after my testimony at Delma's trial, I left Texarkana, Texas. During my years as a police informant, I had helped the police put a lot of people away on drug charges. I had been paid for my work. I left because the people I had helped the police put away found out that I was a police informant. I was afraid of them. Also, Dale Hampton told me that I should stop working for the police because my life might be in danger. Because of all this, I am afraid to return to Texarkana, Texas because I fear for my life.

I have read the above paragraphs, numbered one through thirteen and declare under penalty of perjury that the foregoing information is true and correct.

Executed on 11-4-96

/s/ Robert Lee Farr
ROBERT LEE FARR

WITNESSED BY:
/s/ Tena Francis 11/04/96

County of San Bernardino)
)
State of California)

DECLARATION OF ROBERT LEE FARR

I declare, under penalty of perjury, that the following is true:

1. My name is Robert Lee Farr. I currently live in Rialto, California. I am over eighteen years of age. I have read this document and believe everything written in it to be true.

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Department, asked me to work for him on his investigation of Delma. Willie stopped me outside my doctor's office and asked me to get into his car. While I sat in his car Willie asked me to help him with a case. He did not tell me that this case had to do with Richard Whitehead's murder.

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14. Finally, because of fear of revealing my former life as an informant, I agreed to speak with representatives of Delma Banks in 1996, and again in 1999, only reluctantly, and only after they made considerable effort to locate me. I would not have revealed the information in this declaration to them, or to anyone else, before I elected to do so in the fall of 1996.

I have read the above paragraphs, numbered one through fourteen and declare under penalty of perjury that the foregoing information is true and correct.

Executed on May 21, 1999

/s/ Robert Lee Farr
ROBERT LEE FARR

WITNESSED BY:
/s/ Gail Greco
GAIL GRECO

AFFIDAVIT IN ANY FACT

THE STATE OF TEXAS COUNTY OF DALLAS

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, Sue Walthall, a Notary Public in and for said County, State of Texas, on this day personally appeared CHARLES E. COOK

Who, after by being me duly sworn, on oath deposes and says: The real truth of my knowing:

I, Mr. Charles E. Cook, 1734 South Marsalis, here in Dallas, Texas 75216, hereby speak in print of the truth. On a Saturday morning two weeks, April 12, 1980, me and my future wife, Ms. Ida Marie Martin, was standing at the bus stop waiting for the bus around 8:00 a.m. or 8:30 a.m., when a fast Mustang drove up and stopped at the corner of 1734 South Marsalis. He, the man (Red) Delman Banks, ask me about a cheap motel to stay for a few days. He said he only had about $70.00 on him. So I told him to pull over and I would try to help him find a reasonable place for less money since he had little on him from out of town. (Red) Mr. Delman Banks I thought was a cool brother, and I ask him if he would take my wife to work since she was running late. So he (Delman Banks) said he would and I ran in the house and pulled off my robe and got dressed and got in the fast hot rod two-tone green mustang car and we took off to the Hyatt Regency downtown. We left the Hyatt Regency downtown and went back over to my house, 1734 South Marsalis and I introduced Delman Banks to my grandmother. She approved of him and I put him in some brown pants and a blue shirt, and we went riding to West Dallas to visit a few of my friends and my sister to see her little baby boy she had for Easter. After that we left and went riding to find (Red) Delman Banks a place to stay so that he could take a bath because he had blood on his right leg. I said (Red) what blood

on you for. He said he got in to it with a white boy coming to Dallas on the highway. I said what you do man, he said I shot him, I said did you kill him, he said hell yea, the bitch is dead. I kinda got afraid at his feeling come after he told me that. Later on we drunk beer and wine. I took Red to a motel on Lancaster to the left on a hill $5.00 for two hours. He told me to take his car and come back to get him, because he needed some rest and a bath. So I took off just riding around. I went and got my chickens something to eat and brought me three more baby chicks. Then I went back and got (Delman Banks) on Lancaster, but he was out like a light. So I left again just enjoying the fast car he had that I thought was his. I went back for the third time after leaving him there, he was still asleep but I woke him up because his time had run out on him. We left and got something to eat and riding about the streets.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF APRIL A.D. 1980.

/s/ Sue Walthall
SUE WALTHALL
Notary Public, Dallas County, Texas

AFFIDAVIT IN ANY FACT

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, Sue Walthall, a Notary Public in and for said County, State of Texas, on this day personally appeared CHARLES E. COOK.

Who, after being by me duly sworn, on oath deposes and says:

just talking about different things of life, of him making it in Dallas, him and his wife in Texarkana. I told him I would try to help him all I could if he wanted to settle down. Okay that night (Saturday), I let Red spend the night with me at my grandmother's home, and then that's when I noticed Red had a pistol 25 with him in his jacket. (Red) was looking sad for some reason sitting on the bed in the other room. I sat down beside him and told him that something was wrong and that he could tell me the truth about his sadness. He looked at me with tears in his eyes and said man I have lied to you about the whole thing. I said tell me the truth right because I have been to prison two times already and I can't stand no kind of trouble at all. Red said man me and this white boy was in the woods in Texarkana drinking when I thought about killing him and taking his car to Dallas just for the hell of it. He said the white boy started to the car to get another beer when he (Delman Banks) shot him and kinda miss him across the head. He said the white boy turned around and said man what's happening. What's wrong, what did I do. Red said he shot him again and again, and the white boy fell, Delman Banks told me he got into his car and looked down at him and shot him again through the head to make sure the boy was dead. He said he then ran over the boy's legs in the two-tone green Mustang and headed for the Big D. I told Red to get down on his knees and pray and ask God to forgive him and go back on and turn his self in for his punishment. He said no

way I'll go back there and do that. I said okay but you can not stay here because I live with my people. That Sunday the 13th, 1980, we went over to different peoples homes, apartments for a place for Red to stay. He called his home and his mother told him the same thing. Turn his self in. So I went to work that Monday the 14th, 1980, and left (Red) alone in my grandmother's house without telling them the truth of Mr. Delman Banks. That Monday evening I put Red on the Greyhound Bus at 5:45 p.m. and I, Charles E. Cook left the bus station in the Mustang. The next morning around 6:00 a.m. I took the hot car and left it at the end of Canna Drive with the keys under the seat and I took Red's pistol and sold it to a friend across the street of Marsalis for $10.00 and the radio. Booster cables and small tool box for a total price of $15.00. And that's the truth of my nature of this young man Mr. Delman Banks.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF APRIL A.D. 1980.

/s/ Sue Walthall
SUE WALTHALL
Notary Public, Dallas County,

AFFIDAVIT IN ANY FACT

THE STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, Eileen J. Murray, a Notary Public in and for said County, State of Texas, on this day oersonally appeared Charles E. Cook

Who, after being by me duly sworn, on oath deposes and says:

I Charles E. Cook got the pistol 25 cal. AG Brand, Service #374172 back from Mr. Bennie Lee Jones, the day of April 24, 1980 at the time of 8:50 a.m with offers to the adrest of 1738 So. Marsalis, of the home of Mr. Jones. Mr Jones retune the pistol 25 AG. Bran back to me said of Charles E. Cook. The gun I sold to Mr. Jones is the same gun that Delman Banks gave to me (Charles E. Cook) as state it in the frist statement as sing. Time 8:50 a.m.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF APRIL A.D. 1980.

/s/ Eileen J. Murray
EILEEN J. MURRAY
Notary Public, Dallas County, Texas

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Sep. 23, 2002]

No. 01-40058

DELMA BANKS, JR.
Petitioner - Appellee-Cross-Appellant,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent - Appellant-Cross-Appellee.

Appeal from the United States District Court for the Eastern District of Texas, Texarkana

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ON PETITION FOR REHEARING

Before HIGGINBOTHAM, BARKSDALE, and DENNIS, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]

United States Circuit Judge